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Social Security Disability Determinations: Recommendations for Reform

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There is a widespread perception today that the federal courts face a crisis caused by dramatic increases in their caseloads.[1] In response to this problem, Congress created the Federal Courts Study Committee and directed it to examine problems facing the federal courts, develop a long-range plan for

1. *See, e.g., State of the Judiciary and Access to Justice: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 6-10 (1977) (letter from Chief Justice Burger); *id.* at 242-43 (testimony of Robert Bork); COMMISSION ON THE REVISION OF THE FEDERAL JUDICIAL SYSTEM, DEPT. OF JUSTICE, THE NEEDS OF THE FEDERAL COURTS 1 (1977); COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 1-2 (1975); H. FRIENDLY, FEDERAL JURISDICTION 4 (1973); R. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Meador, *The Federal Judiciary—Inflation, Malfunction, and a Proposed Course of Action*, 1981 B.Y.U. L. REV. 617. *But see* Edwards, *The Rising Workload and Perceived "Bureaucracy" of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871 (1983) (arguing that caseload growth does not call for drastic restructuring of federal courts); Jay, *The World According to Judge Posner* (Book Review), 73 GEO. L.J. 1507, 1512-22 (1985) (disputing the adverse impact of caseload growth on federal courts).

the future of the courts, and report on its conclusions.[2] This article presents a study of the determination process for Social Security disability claims[3] which has been prepared for the Subcommittee on the Role of the Federal Courts and Their Relationship to the State Courts.

The determination process for Social Security disability claims is a logical candidate for reform under the Committee's mandate.[4] Review of disability determinations has been quantitatively one of the most significant of the various types of cases contributing to the federal courts' caseload crisis.[5] The disability determination process is lengthy and cumbersome and has been plagued by controversy in recent years. This study concludes that systemic reform is desirable to conserve judicial resources and to improve the disability determination process.

The study consists of three parts. Part I provides a background for the proposed reform by describing the Social Security system in general terms, with particular attention paid to the structure and process for reviewing disability determinations.

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2. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 102, 102 Stat. 4642, 4644 (1988) (to be codified at 28 U.S.C. § 331 note).

3. As used in this study, "Social Security" refers collectively to two federal programs which provide benefits to claimants on the basis of disability. *See infra* notes 6-10 and accompanying text. While there are other eligibility requirements for Social Security disability benefits, whether a particular claimant is in fact "disabled" within the meaning of statutory requirements is by far the most difficult to determine, and therefore disability determinations are the principal source of Social Security decisions reviewed by federal courts. *See* Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 1987 ACUS 625, 677 nn.145-46 (Report for Recommendation 87-7) [hereinafter *Appeals Council Report*].

Excluded from consideration in this study are other types of benefit adjudications within the Department of Health and Human Services' jurisdiction such as Medicare claims, *see generally Proposed New Administrative Appeals Process for Medicare Claims: Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. (1987), as well as programs administered by other departments such as Black Lung benefits. *See* 30 U.S.C. §§ 901-945 (1982) (administered by the Department of Labor).

4. Indeed, there have been various proposals for creating a specialized court to review Social Security disability determinations. *See* Rains, *A Specialized Court for Social Security? A Critique of Recent Proposals*, 15 FLA. ST. U.L. REV. 1 (1987). *See also* Arner, *The Social Security Court Proposal: An Answer to a Critique*, 10 J. LEGIS. 324 (1983) (discussing earlier proposed legislation); Ogilvy, *The Social Security Court Proposal: A Critique*, 9 J. LEGIS. 229 (1982) (same). *See generally* J. MASHAW, C. GOETZ, F. GOODMAN, W. SCHWARTZ, P. VERKUIL & M. CARROW, SOCIAL SECURITY HEARINGS AND APPEALS 146-50 (1978) [hereinafter HEARINGS AND APPEALS] (discussing the idea of a properly constructed article I court favorably). For further discussion of the merits of a specialized Social Security court, see *infra* notes 378-92 and accompanying text.

5. *See infra* note 88 and accompanying text.

Part II examines the crisis generated by the Social Security caseload. It reviews the history of the crisis and presents caseload statistics, discusses various policies and practices that caused dramatic caseload increases in the early 1980s, and draws conclusions regarding the need for reform and the shape that reform should take. Part III then presents four specific recommendations for reforming the Social Security disability determination process and examines their implications. In particular, the study recommends that (1) judicial review of disability determinations should be vested exclusively in the United States Court of Appeals for the Federal Circuit (eliminating district court review), and that the review should be limited to legal questions and constitutional issues; (2) an independent Court of Disability Appeals should be created to conduct final administrative review; (3) administrative law judges adjudicating disability cases should be placed in an independent corps; and (4) efforts to improve disability determinations at the initial state level should be continued. Taken together, these four recommendations amount to a systematic restructuring of the disability determination process, thus creating a unified and specialized yet independent institutional structure for adjudicating and reviewing disability claims.

I. Social Security Disability Determinations

What is commonly referred to as "Social Security" includes two distinct programs.[6] The first program, commonly known as Old Age Survivors and Disability Insurance (OASDI), is basically a form of insurance in which coverage is purchased.[7] The second program, Supplemental Security Income (SSI), is a welfare program in which eligibility is based on need.[8] Although the

6. There are a number of general works on the Social Security system and the disability determination process. *See, e.g.*, D. Cofer, Judges, Bureaucrats, and the Question of Independence: A Study of the Social Security Administration Hearing Process (1985); Hearings and Appeals, *supra* note 4; L. Liebman, Disability Appeals in Social Security Programs (1985); H. McCormick, Social Security Claims and Procedures (1983 & Supp. 1989); J. Mashaw, Bureaucratic Justice (1983); S. Mezey, No Longer Disabled: The Federal Courts and the Politics of Social Security Disability (1988); D. Stone, The Disabled State (1984); B. Webster & R. Perry, The Complete Social Security Handbook (1983); *Appeals Council Report*, *supra* note 3.

7. The OASDI was enacted as the Old Age, Survivors, and Disability Insurance Benefits Amendments of 1956, and codified as amended at 42 U.S.C. §§ 401-405 (1982 & Supp. V 1987) (Title II of the Social Security Act). Implementing regulations are codified at 20 C.F.R. Pt. 404 (1989).

8. The Social Security Amendments of 1972, Pub. L. No. 92-603, § 301, 86 Stat.

two programs have different financial eligibility requirements,[9] their disability requirements are the same. The determination of disability occupies the bulk of the Social Security Administration's (SSA) adjudicatory work.[10] This determination involves the application of intricate substantive standards through an elaborate, multi-layered procedural framework.

A. Substantive Standards

The key issue in most Social Security cases is whether a claimant is "disabled" within the meaning of the relevant statutory provisions. Both OASDI and SSI define disability as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[11] Both programs require that a claimant's impairment or combination of impairments must be "of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . . ."[12]

In applying these provisions to determine disability, the SSA currently employs a five-step process.[13] The first step is to

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1329, 1465-75 (1972) (codified as amended at 42 U.S.C. §§ 1381-1383c (1982 & Supp. V 1987)) (Title XVI of the Social Security Act), replaced the previously state-run program with a federal program operated through the same administrative apparatus as OASDI. Implementing regulations for SSI generally parallel OASDI regulations, and are codified at 20 C.F.R. Pt. 416 (1989).

9. To meet OASDI financial eligibility requirements, a claimant must have earned a sufficient number of "quarters of coverage" by working at covered employment and having sufficient Social Security (Federal Insurance Contribution Act (FICA)) taxes withheld from his or her wages and matched by the employer during the period preceding the onset of disability. SSI is a need based system in which financial eligibility is determined solely on the basis of income and "resources" (*i.e.*, assets). For a general description of financial eligibility requirements, see *Appeals Council Report*, *supra* note 3, at 641-44.

10. *See Current Problems in the Social Security Hearings and Appeals Process: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 99th Cong., 2d Sess. 62 (1986) [hereinafter *Current Problems*] (statement of Frank V. Smith III, Associate Commissioner of Hearings and Appeals, Social Security Administration).

11. 42 U.S.C. § 423(d)(1)(A) (1982 & Supp. V 1987) (OASDI); *id.* § 1382c(a)(3)(A) (SSI).

12. *Id.* § 423(d)(2)(A) (OASDI); *id.* § 1382c(a)(3)(B) (SSI).

13. *See* 20 C.F.R. § 404.1520 (1989) (OASDI); *id.* § 416.920 (SSI). *See generally* Bowen v. Yuckert, 482 U.S. 137, 140-42 (1987).

determine whether the claimant is engaged in substantial gainful activity.[14] If so, the claimant is deemed not disabled and benefits are denied; if not, SSA proceeds to the second step. At step two, SSA determines whether the claimant's impairment or combination of impairments is "severe" within the meaning of statutory requirements.[15] If not, the claimant is not disabled; if so, the agency proceeds to the third step. At step three, SSA determines whether the claimant's impairment or combination of impairments is equal to or greater than the listing of impairments contained in the Social Security regulations.[16] If so, then the claimant is disabled; if not, the agency proceeds to the fourth step. At step four, SSA determines whether the claimant has sufficient "residual functioning capacity" to return to his or her previous employment.[17] If so, then he or she is not disabled; if not, SSA proceeds to the fifth step. At step five, the burden shifts to SSA to provide evidence that the claimant can perform work that is available in the national economy.[18] This determination is based either on a set of objective criteria compiled in the "grids"[19] or on an individualized vocational determination for claimants whose impairments do not fit in the grids.[20] A claimant is

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14. 20 C.F.R. § 404.1572 (1989) (OASDI); *id.* § 416.972 (SSI).

15. "Severity" involves both the ability to perform basic work activities, *see id.* § 404.1521 (OASDI); *id.* § 416.921 (SSI), and the statutory 12-month duration requirement. *See id.* § 404.1509 (OASDI); *id.* § 416.909 (SSI).

16. *See id.* Pt. 404, Subpt. P, app. 1.

17. Residual functioning capacity (RFC) measures a claimants' physical and mental ability to perform work, and involves evaluation of factors such as the ability to walk, stand, sit, bend, and lift, as well as memory, ability to adjust psychologically to work, and various other factors. *See id.* § 404.1545 (OASDI); *id.* § 416.945 (SSI). Currently, SSA makes a finding as to whether the claimant can perform sedentary, light, medium, heavy, or very heavy work. *See id.* § 404.1567 (OASDI); *id.* § 416.967 (SSI). RFC is relevant not only to the claimant's ability to return to previous employment, but also to the application of the grids at step five of the process. *See infra* note 19 and accompanying text.

18. *See* Bowen v. Yuckert, 482 U.S. 137, 146 n.5 (1987); Torres v. Schweiker, 682 F.2d 109 (3d Cir. 1982), *cert. denied*, 459 U.S. 1174 (1983); Tennant v. Schweiker, 682 F.2d 707 (8th Cir. 1982). *See also* L. LIEBMAN, *supra* note 6, at 13-14.

19. The grids are tables based upon national patterns of job availability in which RFC, *supra* note 17, and vocational factors such as age, education, and skill level are used to determine whether a claimant can perform work that is available in the national economy. *See* 20 C.F.R. Pt. 404, Subpt. P, app. 2 (1989); Heckler v. Campbell, 461 U.S. 458 (1983) (upholding use of grids).

20. The grids are binding when a claimant's exertional and nonexertional impairments match precisely with a category defined by the grids. When the match is imperfect, however, the grids can only be used as guidelines. *See, e.g.*, Talbot v. Heckler, 814 F.2d 1456, 1460 (10th Cir. 1987). *See also* 20 C.F.R. § 404.1569 (1989) (OASDI); *id.* § 416.969 (SSI). In such cases, the SSA will often hear testimony from vocational experts

deemed disabled only if no work is available in the national economy regardless of whether there is work in the claimant's geographic area or whether the claimant is likely to be hired to perform such work. If the agency fails to prove that work is available in the national economy, the claimant is determined to be disabled and entitled to benefits.

Various factors combine to make the determination of disability under these standards difficult. First, applicable regulations such as the listing of impairments and the grids are highly technical and complex.[21] Second, evaluation of the medical and vocational evidence typically presented in Social Security claims is inherently subjective.[22] Third, at several steps of the process a claimant's subjective assertions of pain or other symptoms may be crucial in evaluating the degree of impairment, and therefore disability determinations often depend on an assessment of credibility.[23] Such substantive problems compound SSA's burden in moving myriad claims through the laborious disability claims process.

B. The Disability Claims Process

Social Security disability claims proceed through an elaborate network involving many levels of bureaucracy. After an initial application is received by a regional SSA branch office, the

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regarding the availability of jobs in the national economy that can be performed by the claimant. *See, e.g.*, Campbell v. Bowen, 822 F.2d 1518, 1520 (10th Cir. 1987).

21. *See* 20 C.F.R. Pt. 404, Subpt. P, apps. 1 & 2 (1989).

22. *See* D. STONE, *supra* note 6, at 133 (describing studies demonstrating inconsistencies in disability determinations); Chassman & Rolston, *Social Security Disability Hearings: A Case Study in Quality Assurance and Due Process*, 65 CORNELL L. REV. 801, 817 (1980) (describing high rate of evidentiary error in disability hearings).

23. In order to establish disability, a claimant's statements as to pain must be supported by objective evidence of a medical impairment that could reasonably be expected to produce pain. This requirement was initially imposed by a statutory provision, 42 U.S.C. § 423(d)(5)(A) (1982), which has since lapsed under sunset provisions, *see* Pub. L. No. 98-460, § 3(a), 98 Stat. 1794, 1799 (1984), but has continued as SSA policy under Social Security Ruling 82-58. Once the medical cause of pain is identified, however, SSA must consider testimony concerning subjective conditions such as pain. *See* Avery v. Secretary of Health and Human Serv., 797 F.2d 19 (1st Cir. 1986); Foster v. Heckler, 780 F.2d 1125 (4th Cir. 1986); Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984). For general discussion of pain in Social Security disability determinations, see COMMISSION ON THE EVALUATION OF PAIN, DEPT. OF HEALTH AND HUMAN SERV., REPORT OF THE COMMISSION ON THE EVALUATION OF PAIN (1986) [hereinafter EVALUATION OF PAIN]; D. STONE, *supra* note 6, at 134-39; Goldhammer & Bloom, *Recent Changes in the Assessment of Pain in Disability Claims Before the Social Security Administration*, 35 ADMIN. L. REV. 451 (1983). SSA's treatment of subjective claims of pain has provoked some controversy in recent years. See *infra* notes 170-79 and accompanying text.

first level to address the disability issue is a state agency operating under federal supervision.[24] The state agency's determination is then subject to administrative review at the federal level.[25] Finally, SSA decisions are subject to judicial review in federal court.[26]

1. State Disability Determination Service

The disability determination process begins at a state Disability Determination Service (DDS).[27] The DDS is a federally funded state agency subject to SSA regulation and is normally located in the State Department of Vocational Rehabilitation.[28] The DDS makes an initial determination of disability for both new applications and Continuing Disability Reviews of previously allowed claims.[29] The DDS may also reconsider its initial determination upon the request of a disappointed claimant.[30]

a. Initial determination. In the case of a new application, the DDS must develop a medical file in order to make an initial determination of disability. Although the claimant is required to provide the DDS with pertinent information, the DDS will solicit relevant medical records at its own expense[31] and, if necessary, order an examination by a consulting physician under contract with the DDS.[32] Once the DDS compiles sufficient information, a medical advisor and a disability examiner make

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24. *See infra* notes 27-50 and accompanying text.

25. *See infra* notes 51-76 and accompanying text.

26. *See infra* notes 77-87 and accompanying text.

27. Before forwarding an application for benefits to the state DDS, the district SSA office will make a threshold determination of whether the applicant meets the relevant financial eligibility requirements. *See Appeals Council Report*, *supra* note 3, at 661.

28. *See* 20 C.F.R. Pt. 404, Subpt. Q (1989) (OASDI); *id.* Pt. 416, Subpt. J (SSI).

29. Initial determinations also involve a variety of other issues, such as the amount of benefit; reduction of benefit because of work, workers compensation, refusal to accept rehabilitation services, or penalties; computation of overpayment or underpayment; revision of earnings record; and the proper recipient of benefits. *See id.* §§ 404.902-.905 (OASDI); *id.* §§ 416.1402-.1405 (SSI). Such issues comprise only a small portion of the adjudicatory workload in awarding disability benefits.

30. *See infra* notes 40-50 and accompanying text.

31. *See* 20 C.F.R. §§ 404.1512-.1514 (1989) (OASDI); *id.* §§ 416.912-.914 (SSI).

32. *See id.* §§ 404.1517-.1518 (OASDI); *id.* §§ 416.917-.918 (SSI). The frequent use and uncertain quality of such consultative examinations has recently been drawn into question. *See* HOUSE COMM. ON GOVERNMENT OPERATIONS, CONSULTATIVE EXAMINATIONS INVESTIGATION, H.R. REP. No. 981, 99th Cong., 2d Sess. (1986) [hereinafter CONSULTATIVE EXAMINATIONS INVESTIGATION]; Weinstein, *Equality and the Law: Social Security Disability Cases in the Federal Courts*, 35 SYRACUSE L. REV. 897, 908 (1984). *See also infra* notes 219-23 and accompanying text.

the initial determination of disability based on this paper record.[33] Since the claimant has the burden of proving disability,[34] inadequacies in the compilation of the record may lead to a denial of benefits.[35]

A second type of initial determination is the Continuing Disability Review (CDR) that is conducted periodically or upon the occurrence of specified events to determine whether a claimant's medical condition has significantly improved.[36] Like new applications, CDR determinations are made on the basis of a paper record.[37] The focus of CDR differs from the initial determination of disability for new applicants, however. In new application cases, the issue is whether an initial disability is established, while in CDR cases, the issue is whether a previously established disability has improved to the point where the claimant is no longer entitled to benefits.[38] Termination of benefits under CDR

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33. *See* 20 C.F.R. § 404.1615(c) (1989) (OASDI); *id.* § 416.1015(c) (SSI). The disability examiner performs most of the work in compiling the medical evidence, with the medical advisor providing expertise where necessary regarding medical conditions. *See Appeals Council Report*, *supra* note 3, at 662 n.108. SSA is currently experimenting with providing claimants the opportunity for "personal appearance interviews" at the initial determination stage. *See* 20 C.F.R. § 404.906 (1989) (OASDI); *id.* § 416.1406 (SSI). *See generally* Shoenberger, *State Disability Services' Procedures for Determining and Redetermining Social Security Claims for the Social Security Administration*, 1987 ACUS 579 (Report for Recommendation 87-6) [hereinafter *State Procedures Report*]; *infra* notes 412-17 and accompanying text.

34. *See* 20 C.F.R. § 404.1512(a) (1989) (OASDI); *id.* § 416.912(a) (SSI). *See also* 5 U.S.C. § 556(d) (1988) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."). *See generally* 2 H. McCormick, *supra* note 6, §§ 635-45 (1983).

35. Recently there has been some concern over the adequacy of DDS case preparation, particularly in the face of budgetary reductions. *See Appeals Council Report*, *supra* note 3, at 661 n.106; *infra* notes 219-23 and accompanying text.

36. *See* 20 C.F.R. § 404.1590 (1989) (OASDI); *id.* § 416.990 (SSI). CDR was mandated by the Social Security Disability Amendments of 1980, Pub. L. No. 96-265, 94 Stat. 441 (1980). After various problems emerged with the initial implementation of the CDR program under the Reagan Administration, *see infra* notes 124-53 and accompanying text, Congress enacted several statutes revising the program. The most significant of these statutes was the Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984). For a general discussion of the changes made by this statute, see H. McCormick, *supra* note 6, § 44 (Supp. 1989).

37. In the OASDI program, if the DDS determines that a claimant is no longer disabled, the claimant is entitled to pretermination notice and the opportunity to respond and submit new information. *See* 20 C.F.R. § 404.1595 (1989). In SSI cases, after pretermination notice the claimant proceeds directly to the reconsideration stage. *See id.* § 416.995. The experimental program which provides an opportunity for a "personal appearance interview," *see supra* note 33, extends also to CDR cases in which the claimant is entitled to an interview prior to termination of benefits. *See id.* § 404.906 (OASDI); *id.* § 416.1406 (SSI).

38. *Appeals Council Report*, *supra* note 3, at 663. *See* 20 C.F.R. § 404.1594 (1989)

requires substantial evidence to sustain one of several statutory grounds for termination; therefore any inadequacy in the record will tend to benefit the claimant.[39]

b. Reconsideration. Disappointed claimants may request a reconsideration of their disability status. Reconsideration comprises the first level of review of disability determinations.[40] The procedures employed upon reconsideration vary depending on whether the case is a new application or CDR. For new applications, different agents within the DDS[41] are assigned to reconsider the decision pursuant to the same procedures that apply in initial determinations.[42] The claimant has the right to submit additional evidence at this stage.[43]

When a claimant seeks reconsideration of a CDR decision, he or she is generally entitled to a "disability hearing."[44] The hearing may be conducted by a federal official or under the auspices of a separate state agency for disability hearings.[45] In con-

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(OASDI); *id.* § 416.994 (SSI).

39. *See* 42 U.S.C. §§ 423(f), 1382c(a)(4) (1982 & Supp. V 1987). For further discussion of the standard to be applied in CDR cases, see *infra* notes 135-38, 148-53 and accompanying text.

40. This proposition must be qualified in two respects. First, prior to notifying a claimant of the results of the initial determination, a sample of state DDS decisions are subjected to preeffectuation or "Quality Assurance Review" (QAR) by federal SSA appraisers. 42 U.S.C. 421(c) (1982); 20 C.F.R. § 404.1503(d) (1989) (OASDI); *id.* § 416.903(d) (SSI). *See Appeals Council Report*, *supra* note 3, at 664 n.112. For the purposes of this study, this program is not treated as a separate level of review. Second, under the experimental program providing for "Personal Appearance Interviews" at the initial determination stage, such interviews replace reconsideration by the DDS. *See State Procedures Report*, *supra* note 33, at 585.

41. *See Appeals Council Report*, *supra* note 3, at 666 n.117; 1 R. GILBERT & J. PETERS, SOCIAL SECURITY DISABILITY CLAIMS § 3:11, at 73 (1988) (reconsideration staff receives more extensive training than initial determination staff).

42. *See* 20 C.F.R. § 404.913 (1989) (OASDI); *id.* §§ 416.1413-.1413a (1989) (SSI). However, nonmedical issues in SSI cases may be resolved through an informal conference at the option of the claimant. *See id.* § 416.1413a(a).

43. *See id.* § 404.913(a) (OASDI); *id.* §§ 416.1413(a)-.1413a (SSI).

44. *See id.* §§ 404.913-.917 (OASDI); *id.* §§ 416.1413-.1417 (SSI). *See generally* H. MCCORMICK, *supra* note 6, § 609.5 (Supp. 1989). This requirement was imposed on SSA only with respect to OASDI cases by the 1982 amendments to the Social Security Act, Pub. L. No. 97-455, 96 Stat. 2497 (1983), but SSA extended the option to SSI cases in order to preserve the parallel structure for resolving disability claims under both programs. H. MCCORMICK, *supra* note 6, § 609.5, at 368-69, 372-73 (Supp. 1989). Prior to the adoption of the regulations implementing this provision, there was no opportunity for reconsideration in SSI CDR cases; the claimant proceeded directly to a hearing before an ALJ, which was held prior to the actual termination of benefits. *See id.* at 373.

45. The original statute gave the Secretary of Health and Human Services the responsibility for determining whether federal or state officials would conduct the disability hearing. In its implementing regulations, SSA initially proposed a joint state-federal

nection with a disability hearing, a claimant has the right to representation, to SSA assistance in obtaining evidence, to review the evidence in the file, and to present and cross examine witnesses.[46] The SSA regulations provide that SSA personnel determine nonmedical issues.[47] In OASDI cases, such determinations are made through a paper hearing process[48]; in SSI cases, these determinations are made through a paper hearing process, informal conference, or formal conference at the election of the claimant.[49] When a formal or informal conference is held in SSI cases, the claimant is entitled to some limited procedural rights.[50]

2. *Federal administrative review*

If a claimant is not satisfied with the determination rendered at the reconsideration stage, a two-tiered system of administrative review is available at the federal level. First, the disappointed claimant is entitled to a hearing before an administrative law judge (ALJ).[51] The ALJ hearing, which is often the claimant's first opportunity to appear in person and present witnesses,[52] is a *de novo* reconsideration of the disability issue.[53] Al-

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approach in which a state DDS official would prepare the case for the hearing, and the federal disability hearing officer would then conduct the hearing. However, SSA was persuaded by a number of state officials whose comments urged that SSA give states the option of setting up separate units to conduct the hearings. The current regulations provide that states may appoint a hearing officer from a state disability hearing unit if a state DDS made the initial determination. *See* 20 C.F.R. § 404.915 (1989) (OASDI); *id.* § 416.1415 (SSI). *See generally* H. McCormick, *supra* note 6, § 609.5, at 376-78 (Supp. 1989).

46. *See* 20 C.F.R. § 404.916(b) (1989) (OASDI); *id.* § 416.1416(b) (SSI). An official within the agency making the initial determination will prepare the case file for the hearing and may make a favorable reconsideration decision without a hearing. *See id.* § 404.916(c)-(d) (OASDI); *id.* § 416.1416(c)-(d) (SSI).

47. *See id.* § 404.914(a)(2) (OASDI); *id.* § 416.1414(a)(2) (SSI). The statute is unclear on this point, but the SSA regulations reflect the similar division of authority at the initial determination phase. *See supra* note 27. *See generally* H. McCormick, *supra* note 6, § 609.5, at 375-76 (Supp. 1989).

48. *See* 20 C.F.R. § 404.913 (1989).

49. *See id.* §§ 416.1413-.1413c.

50. In an informal conference, the claimant has the right to present witnesses; in a formal conference, the claimant may also request that SSA subpoena relevant witnesses or documents and may cross-examine adverse witnesses. In either case a summary of the proceeding goes into the claimant's record. *See id.* § 416.1413(b)-(c).

51. *See id.* § 404.929 (OASDI); *id.* § 416.1429 (SSI).

52. *See id.* § 404.950 (OASDI); *id.* § 416.1450 (SSI). If the claimant has had a disability hearing at the initial determination or reconsideration stage, the ALJ hearing would be the second opportunity for a hearing. *See supra* notes 33, 44-46 and accompanying text. A case may be disposed of without a hearing if the ALJ reaches a decision

though the ALJ works with the record on which the initial determination and reconsideration were based, additional evidence is freely admitted.[54] The ALJ hearing is relatively informal and essentially nonadversarial; SSA has no representative who appears to oppose the claimant,[55] and the ALJ not only develops the record and decides the case, but also has the responsibility to assist the claimant in presenting his or her claims.[56] Various provisions of the Administrative Procedure Act (APA) apply to ALJ hearings and preserve the independence of ALJs.[57] Despite the nonadversarial nature of the proceeding, the majority of claimants are represented by counsel at this stage.[58]

The SSA Appeals Council conducts the next level of review.[59] Cases come before the Council in various ways. Disappointed applicants may request the Council to review the ALJ's decision, in which case the Council may deny review, grant review on one of several grounds, or dismiss the case if the request was untimely or if the claimant requests dismissal.[60] In addition,

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favorable to the claimant or remands the case for further proceedings or if the parties do not wish to appear. *See* 20 C.F.R. § 404.948 (1989) (OASDI); *id.* § 416.1448 (SSI). The case may also be dismissed without a hearing on a variety of grounds. *See id.* § 404.957 (OASDI); *id.* § 416.1457 (SSI).

53. 42 U.S.C. § 405(b)(1) (1982) (OASDI); *id.* § 1383(c)(1) (SSI).

54. *See* 20 C.F.R. §§ 404.944, 404.950 (1989) (OASDI); *id.* §§ 416.1444, 404.1450 (SSI).

55. The SSA experimented with using "government representatives" to oppose claimants in ALJ hearings, but the experiment was halted after it was enjoined by a federal district court. Salling v. Bowen, 641 F. Supp. 1046 (W.D. Va. 1986). *See Appeals Council Report*, *supra* note 3, at 670 n.128.

56. While the claimant may present evidence and call witnesses, the ALJ may question the claimant and any other witnesses, order consultative examinations, and call for expert medical and/or vocational testimony. *See generally* 2 H. McCormick, *supra* note 6, §§ 573-75; *Appeals Council Report*, *supra* note 3, at 670-71.

57. 5 U.S.C. §§ 554(d), 3105, 5362, 7521 (1988). *See Appeals Council Report*, *supra* note 3, at 669 & n.125. The Appeals Council's controversial practice of "targeting" certain ALJ's for own-motion review was widely perceived as a threat to the decisional independence of ALJs. *See infra* notes 199-218 and accompanying text.

58. *See Appeals Council Report*, *supra* note 3, at 668 n.123 (citing 9 Soc. Security F. No. 3, at 7 (Mar. 1987)). The payment of fees to representatives must be approved by SSA. *See* 42 U.S.C. § 406 (1982); 20 C.F.R. § 404, Subpt. R (1989) (OASDI); *id.* § 416, Subpt. O (SSI). Under proper circumstances, a court may order the government to pay fees pursuant to the Equal Access to Justice Act. *See infra* note 366.

59. The Council, which consists of 20 members organized into four geographic units, was created by regulation in 1940. For a detailed description of the Council's legal basis, history, composition, and staff, see *Appeals Council Report*, *supra* note 3, at 687-704.

60. *See* 20 C.F.R. §§ 404.967-.981 (1989) (OASDI); *id.* § 416.1467-.1481 (SSI). Under the regulations, the Council will review a case if the ALJ's decision constitutes either an abuse of discretion, contains an error of law, is unsupported by substantial evidence, or if the case presents an important issue of law or policy. *See id.* § 404.970(a) (OASDI); *id.* §

the Council may review ALJ decisions on its own motion[61] and, in various circumstances, reopen cases.[62] Decisions under review may be affirmed, reversed, modified, or remanded for a new ALJ hearing.[63] In addition to its review function, the Council may also become involved in a case when further review is sought in a federal district court[64] or after a court remands a case for further consideration by SSA.[65]

The review process at the Appeals Council level typically involves a sequential evaluation of the record.[66] The case is first sent to a division of the Office of Appeals Operations where it is

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416.1470(a) (SSI). In addition, the Council will review a case if new evidence is submitted and the ALJ decision is contrary to the weight of the evidence. *See id.* § 404.970(b) (OASDI); *id.* § 416.1470(b) (SSI). Most courts have held the Council's jurisdiction to review cases is not limited to the reasons listed in the regulations. *See, e.g.*, Bauzo v. Bowen, 803 F.2d 917 (7th Cir. 1986); Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986) (en banc); Razey v. Heckler, 785 F.2d 1426 (9th Cir. 1986). *Contra* Baker v. Heckler, 730 F.2d 1147 (8th Cir. 1984).

61. In 1975, caseload pressure caused the Council to terminate its prior practice of reviewing virtually all ALJ decisions for "gross error", but in the 1980 "Bellmon Amendment" Congress required that own-motion review be reinstituted. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 304(c), 94 Stat. 441, 455 (1980) (codified at 42 U.S.C. § 421 (1982 & Supp. V 1987). The Council's practice of "targeting" certain ALJs for own-motion review proved to be controversial, and was eventually abandoned. *See infra* notes 199-209 and accompanying text. Currently, the Council randomly selects ALJ awards for review. *See Appeals Council Report*, *supra* note 3, at 708 & n.229 (10 to 15% in 1987). In addition, the Council reviews on its own motion "protest" cases in which SSA officials protest an ALJ decision on technical or substantive grounds. *See id.* at 711-13.

62. *See* 20 C.F.R. §§ 404.987-.996 (1989) (OASDI); *id.* §§ 416.1487-.1494 (SSI). The SSA's use of this power to routinely reopen cases in which the normal time limits for own-motion review have expired has been controversial. *See Appeals Council Report*, *supra* note 3, at 722-23; *infra* note 265.

63. *See* 20 C.F.R. § 404.979 (1989) (OASDI); *id.* § 416.1479 (SSI).

64. The attorney handling the case for the government may ask the Council to reconsider its decision in light of additional evidence submitted by the claimant, or if the attorney believes the case will be difficult to defend in court even if correctly decided, he or she may suggest that the Council take the case back either to pay the claim or bolster the administrative record and/or rationale for denying benefits. *See Appeals Council Report*, *supra* note 3, at 736-41. Otherwise, the Council generally does not participate in the defense of its decisions in court, nor does the Council follow the fate of its decisions as they are reviewed by the judiciary. *See id.* at 734-36, 741.

65. The Council may "interpret" the court decision before sending the case to an ALJ for further consideration, *see id.* at 742, and is responsible for the final SSA decision after remand. *See infra* note 76 and accompanying text.

66. *See, e.g.*, 20 C.F.R. § 404.970(b) (1989) (OASDI); *id.* § 416.1470(b) (SSI); *Appeals Council Report*, *supra* note 3, at 725-34; 2 H. McCormick, *supra* note 6, § 602. The regulations provide that the Council will grant oral argument upon the request of a claimant if the case presents important issues of law or policy, *see* 20 C.F.R. § 404.976(c) (1989) (OASDI); *id.* § 416.1476(c) (SSI), but oral argument is rarely granted. *See Appeals Council Report*, *supra* note 3, at 730.

randomly assigned to an analyst who prepares the file and makes an initial recommendation.[67] The case is then sent to the Council where it is assigned to a member. If the analyst recommends that review be denied and the member agrees, then review is denied.[68] If the member disagrees with the analyst's recommendation for denial or if the analyst recommends that review be granted, two members will review the case.[69] If these two members agree on a result, their decision is final; if they disagree, the case is reviewed by a third member who casts the deciding vote.[70]

The role of the Appeals Council with respect to ALJ decisions varies slightly depending on whether it is reviewing an initial ALJ decision or an ALJ decision made after remand from a federal court. Initial ALJ decisions are usually final[71] so the Council functions more or less as an appellate tribunal. The Council apparently has power to review an initial ALJ decision *de novo*.[72] Although it has been stated that the scope of review is more limited,[73] the Council has broad power to consider new evidence,[74] and standards governing judicial review of Council decisions imply that the Council is free to independently weigh the evidence and reach its own conclusions.[75] In contrast to initial

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67. *See Appeals Council Report*, *supra* note 3, at 726-28.

68. *See* 20 C.F.R. § 422.205(c) (1989).

69. *See id.* § 422.205(b).

70. *Id.*

71. *See id.* § 404.955 (OASDI); *id.* § 416.1455 (SSI). Thus, if review is denied, the ALJ decision constitutes the final SSA decision.

72. *See* 1 Unempl. Ins. Rep. (CCH) ¶ 12,669, at 1362 (1989); *State Procedures Report*, *supra* note 33, at 582. However, the Council's reasons for rejecting an ALJ's credibility determination must be supported by substantial evidence. *See* Bauzo v. Bowen, 803 F.2d 917, 920-22 (7th Cir. 1986).

73. *Appeals Council Report*, *supra* note 3, at 717-18. The *Appeals Council Report* treats the standards for granting review of a case as the standards of review that will be applied to an ALJ decision. *Id.* This conclusion seems somewhat problematic for several reasons. First, it is inconsistent with the language of the regulations, which speak in terms of reasons for granting review rather than grounds for reversing an ALJ decision. *See* 20 C.F.R. § 404.970 (1989) (OASDI); *id.* § 416.1470 (SSI). Second, at least one of the grounds for granting review, that "[t]here is a broad policy or procedural issue that may affect the general public interest," *id.* § 404.970(a)(4) (OASDI); *id.* § 416.1470(a)(4) (SSI), cannot be applied as a standard of review at all. Finally, since this regulation does not constitute a binding limit on the Council's jurisdiction to grant review of ALJ decisions, *see supra* note 60, it would be inconsistent to treat the regulation as setting forth binding standards governing the scope of review.

74. *See* 20 C.F.R. §§ 404.970(b), 404.976(b) (1989) (OASDI); *id.* §§ 416.1470(b), 416.1476(b) (SSI). *See generally Appeals Council Report*, *supra* note 3, at 719-21.

75. The courts have generally held that the issue upon judicial review is whether the Appeals Council decision, not the ALJ's decision, is supported by substantial evidence.

ALJ decisions, ALJ decisions following remand from federal courts are merely "recommended;" the Council must approve them before they are final.[76]

3. *Judicial review*

A disappointed applicant may appeal SSA's final decision to the federal district courts,[77] then to the circuit courts of appeals, and ultimately to the United States Supreme Court.[78] The reviewing court may affirm the SSA decision, reverse the SSA decision and grant benefits, modify the SSA decision, or remand the case.[79] Review is limited to the questions of whether the SSA's decision is supported by substantial evidence and was made upon the application of correct legal standards.[80] Despite

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See, e.g., Bauzo v. Bowen, 803 F.2d 917 (7th Cir. 1986); Mullen v. Bowen, 800 F.2d 535 (6th Cir. 1986); Fierro v. Bowen, 798 F.2d 1351 (10th Cir. 1986), *cert. denied*, 480 U.S. 945 (1987); Parker v. Bowen, 788 F.2d 1512 (11th Cir. 1986) (en banc); Parris v. Heckler, 733 F.2d 324 (4th Cir. 1984). *But see* Smith v. Heckler, 760 F.2d 184 (8th Cir. 1985) (credibility determinations are for the ALJ); *Appeals Council Report*, *supra* note 3, at 718 n.250 (in practice, reviewing courts devote their attention to the ALJ opinion rather than the Council's decision).

76. *See* 20 C.F.R. § 404.983 (1989) (OASDI); *id.* § 416.1483 (SSI). In other words, the Council does not have the option of denying review. It would appear *a fortiori* that the Council applies a *de novo* standard in determining whether to adopt a recommended decision. However, the *Appeals Council Report* describes the standard of review for ALJ recommended decisions as "something . . . akin to a 'preponderance of the evidence' test." *Supra* note 3, at 743. This standard would not constitute *de novo* review, but it would be less deferential than the substantial evidence test that according to the *Appeals Council Report* is used in ordinary review cases. *Id. See supra* note 73.

77. *See* 42 U.S.C. § 405(g) (1982); 20 C.F.R. § 404.981 (1989) (OASDI); *id.* § 416.1481 (SSI). The Appeals Council's decision or, if the Council denied review, the ALJ's decision constitutes the final decision of the SSA. *Id.* § 422.210. *See id.* § 404.955(c) (OASDI); *id.* § 416.1455(c) (SSI). However, when the ALJ makes only a recommended decision, it is not final until the Appeals Council approves it. *See id.* § 404.955(e) (OASDI); *id.* § 416.1455(e) (SSI); *supra* note 76 and accompanying text. Normally, the claimant must exhaust administrative remedies, 42 U.S.C. 405(g) (1982); Weinberger v. Salfi, 422 U.S. 749 (1975), but this requirement may be waived in exceptional cases. *See* Bowen v. City of New York, 476 U.S. 467 (1986). *See also* 20 C.F.R. §§ 404.923-.928 (1989) (OASDI expedited appeals process for constitutional challenges); *id.* §§ 416.1423-.1428 (SSI expedited appeals process for constitutional challenges).

78. Appeals following district court review proceed as ordinary civil actions. 42 U.S.C. § 405(g) (1982). *See* 28 U.S.C. § 1291 (1982) (appeal to the circuit court); *id.* § 1254(1) (writ of certiorari to the Supreme Court). A relatively small percentage of cases are appealed to the courts of appeals, *see* Table 1, *infra* text accompanying note 108, and the Supreme Court rarely hears disability cases. *See Appeals Council Report*, *supra* note 3, at 675 n.138. *But cf. infra* note 239 and accompanying text (SSA has been successful in obtaining Supreme Court review of important issues).

79. *See* 42 U.S.C. § 405(g) (1982). For a discussion of the circumstances under which remand is proper, see 2 H. McCormick, *supra* note 6, §§ 751-61.

80. *See* 42 U.S.C. 405(g) (1982). *See generally* 2 H. McCormick, *supra* note 6, §§

this deferential standard of review, reversal rates have at times been relatively high.[81]

It is relatively uncommon for first-instance judicial review of administrative decisions to be vested in the federal district courts rather than the courts of appeals,[82] but two main reasons justify district court review of SSA disability determinations.[83] First, the sheer volume of SSA decisions subject to review may demand it.[84] Second, fact-intensive decisions such as SSA disability determinations are generally considered to be appropriate cases for review by district courts.[85] Not only is it desirable to preserve the resources of circuit courts for broader legal and policy issues,[86] but the district courts are also better equipped to develop a record for review.[87]

II. THE NEED FOR REFORM

Appeals from denials of Social Security disability benefits represent a significant component of the caseload crisis that con-

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723-30. Even at this stage of the process, however, the court may remand the case to SSA for the taking of new evidence if there is new evidence regarding disability and good cause for the claimant's failure to include it in the record. *See* 42 U.S.C. 405(g) (1982).

81. During the early to mid-1980s, a period in which SSA applied a number of controversial policies to deny or terminate benefits, reversal rates (excluding remands) exceeded 50% at times. *See* Table 3, *infra* text accompanying note 116. Since that time, reversal rates have declined but still remain relatively high. *See id.*

82. *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 1016 (2d ed. 1985); *Appeals Council Report*, *supra* note 3, at 675 n.137. *See generally* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 1 (1975); Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals*, 88 HARV. L. REV. 980 (1975).

83. For further discussion of the need for district court review in Social Security disability cases, see *infra* notes 284-95 and accompanying text.

84. *Appeals Council Report*, *supra* note 3, at 675 n.137. *See also* Currie & Goodman, *supra* note 82, at 24-25. In other words, the district courts may serve as a kind of screening function for the courts of appeals. Thus, in the 1980s thousands of claimants sought review in district courts each year, but only a small fraction of that number appealed the district court decision to the circuit courts. *See* Table 1, *infra* text accompanying note 108.

85. *See Appeals Council Report*, *supra* note 3, at 675 n.137.

86. *Cf.* Currie & Goodman, *supra* note 82, at 26 (discretionary Federal Circuit Court of Appeals review would enable courts to "weed out" purely evidentiary cases).

87. *See* Harrison v. PPG Indus., Inc., 446 U.S. 578, 596-97 (1980) (Rehnquist, J., dissenting); S. BREYER & R. STEWART, *supra* note 82, at 1016; Currie & Goodman, *supra* note 82, at 10-12. The degree to which this rationale applies to SSA disability cases is unclear because the proper procedure for the district court to follow when confronted with an incomplete or inadequate record or when there is new evidence submitted to supplement the record is to remand the case to the SSA for further proceedings. *See* 42 U.S.C. § 405(g) (1982); 2 H. MCCORMICK, *supra* note 6, § 754.

fronts the federal courts.[88] The sheer number of disability cases that wend their way into federal courts warrants consideration of ways to reform the disability determination process and thereby reduce its contribution to the caseload of an overburdened judicial system. These reform efforts begin with an accurate picture of the dimensions and causes of the disability caseload crisis. Such an examination suggests that while disability cases will continue to be a sizeable drain on judicial resources (absent reform), much of the problem was produced by various controversial regulatory policies of the early 1980s that vastly increased the number of benefit terminations and denials at the administrative level. A closer analysis of these controversies provides considerable insight into vulnerabilities in the disability claims process. The extreme caseload crisis of the early and mid-1980s was to some extent aberrational, but its implications for reform are not.

A. The Caseload Crisis

1. Historical overview

In 1972, Congress enacted legislation to bring a number of disparate state welfare programs[89] under the umbrella of SSA.[90] The new federal SSI program took effect on January 1, 1974.[91]

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88. New appeals from denials of Social Security disability benefits under OASDI and SSI constituted 7.8% of all new district court filings in 1983 (18,764 of 241,842); 11% in 1984 (28,710 of 261,485); 6.9% in 1985 (18,747 of 273,670); 5.3% in 1986 (13,448 of 254,828); and 5.3% in 1987 (12,628 of 238,982). *See* 1987 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at Table C-2A [hereinafter DIRECTOR REPORT]. During this period, there have been approximately 40,000 to 50,000 disability cases pending in district courts at any given time. *See Appeals Council Report*, *supra* note 3, at 677. Social Security cases represented a smaller proportion of the courts of appeals caseload: 4.0% in 1983 (992 of 25,039); 4.5% in 1984 (1204 of 26,606); 4.2% in 1985 (1188 of 28,560); 4.0% in 1986 (1178 of 29,425); and 3.2% in 1987 (982 of 30,798). DIRECTOR REPORT, *supra*, at Table B1A (referring to years 1983-87). Although precise figures were unavailable, the percentages for OASDI and SSI cases alone would be correspondingly smaller. Nevertheless, the number of court of appeals disability cases filed annually remains significant.

89. The legislation did allow states to continue their programs for the disabled with matching federal funds. In addition, anyone who met their particular state's definition of disability would automatically be considered disabled under the federal program for as long as the condition persisted. Social Security Amendments of 1972, Pub. L. No. 92-603, § 1614, 86 Stat. 1329, 1471-72 (1972). *See* 118 CONG. REC. H36,805 (daily ed. Oct. 17, 1972) (statement of Rep. Long).

90. Social Security Amendments of 1972, Pub. L. No. 92-603, § 1601, 86 Stat. 1329, 1465 (1972).

91. *Id.* at § 301, 86 Stat. at 1465.

By 1975, the addition of SSI to the federal Social Security program had substantially burdened the SSA with an expanding caseload, growing costs, and significant delays in the processing time of claims.[92] By the late 1970s, these caseload increases were accompanied by increasing concern over the fiscal integrity of the disability program.[93]

The Director of the Bureau of Hearings and Appeals (now the Office of Hearings and Appeals (OHA)), Robert Trachtenberg, responded to these concerns by establishing the Quality Assurance Review Program.[94] This program was aimed at increasing the consistency of ALJ decisions by equating "quality" with an ALJ's low reversal rate of state denials.[95] Director Trachtenberg issued numerous productivity memos to the ALJs.[96] These memos included stated quotas for ALJ decisions per month[97] and revised personnel policies[98] as leverage to improve productivity.

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92. S. MEZEY, *supra* note 6, at 50. *See also Disability Insurance Legislation: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 96th Cong., 1st Sess. 3-11 (1979) [hereinafter *Disability Insurance Legislation*] (statement of Robert J. Myers, actuarial consultant to the subcommittee). *Cf.* Chassman & Rolston, *supra* note 22, at 807 (ascribing caseloads to both new applications and the increased number and proportion of cases denied and subsequently appealed). From 1970 to 1975, new cases increased 365% and pending cases increased 809%. *Id.* at 236-37.

93. *See Disability Insurance Legislation*, *supra* note 92, at 1-2; Lewis, *Social Security: Public and Private Sector Policy Options for the Future*, 10 J. LEGIS. 81, 85 (1983).

94. *See* D. COFER, *supra* note 6, at 83-107. The program was divided into three parts: (1) the Quality Assurance Review System (a random review of the entire appellate system); (2) the Appellate Appraisal System (a review of individual ALJ decisions for serious deficiencies); and (3) the Regional Chiefs Peer Review System (a review by the Regional Chiefs of new ALJ decisions for technical deficiencies and of Appeals Council remands of ALJ decisions from within their region). *See also Disability Insurance Legislation*, *supra* note 92, at 88-89 (testimony of Robert Trachtenberg defending the Quality Assurance Review system).

95. D. COFER, *supra* note 6, at 84-85. *See also* Bono v. United States Social Sec. Admin., Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979) (lawsuit filed by five ALJs protesting review of decisions of ALJs with high affirmation and reversal rates).

96. *See* D. COFER, *supra* note 6, at 94-96. *See also Disability Insurance Legislation*, *supra* note 92, at 254 (testimony of Robert Trachtenberg acknowledging the pressure put on ALJs).

97. *See Social Security Disability Reviews: The Role of the Administrative Law Judge: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. 269-83 (1983) [hereinafter *ALJ Role*] (statement of position of the Federal Administrative Law Judges Conference); D. COFER, *supra* note 6, at 94-96.

98. Under these policies, the Bureau of Hearings and Appeals reassigned staff attorneys of ALJs if the ALJs were not producing 26 dispositions per month, and also granted requests for hearing office transfers to ALJs on the condition that they maintain high productivity rates. *See* D. COFER, *supra* note 6, at 94-95.

Dissatisfied with the administrative response to the financial and caseload pressures on the system,[99] Congress passed the Social Security Disability Amendments of 1980.[100] The amendments responded to concerns that many recipients were not entitled to benefits[101] by providing for SSA review of state DDS determinations and periodic review of recipients' disabled status.[102] Congress further addressed inconsistencies in the rates at which ALJs reversed state disability determinations by instituting the Bellmon Review Program in which the Appeals Council reviewed ALJ decisions on its own motion.[103]

In the early 1980s, perceiving an electoral and congressional mandate to address the caseload and fiscal problems confronting it, SSA aggressively implemented CDR and Bellmon Review and adopted several restrictive policies and practices designed to improve productivity and prune the disability roles.[104] Ultimately, the harsh results of these policies led to considerable public, judicial, and congressional criticism.[105] Congress addressed some of these problems through reform legislation in 1982[106] and 1984.[107] Other restrictive policies were modified or abandoned by SSA.

The SSA's restrictive policies exacerbated rather than improved caseload pressures by creating a caseload explosion in the review process at both the administrative and judicial level. The explosion resulted from dramatic increases in the denials and terminations of disability benefits which led to a similarly dramatic increase in the number of claimants seeking review. Since these restrictive policies were displaced, caseload pressures

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99. *See Social Security Act Disability Program Amendments: Hearings Before the Senate Comm. on Finance*, 96th Cong., 1st Sess. (1979). *See also infra* note 124 (legislative history of the CDR provision).

100. Pub. L. No. 96-265, 94 Stat. 441 (1980).

101. *See* S. MEZEY, *supra* note 6, at 76-80.

102. Pub. L. No. 96-265, §§ 304, 311, 94 Stat. 441, 453-57, 460 (1980). The latter provision later became the CDR program. *See infra* notes 124-25 and accompanying text.

103. Pub. L. No. 96-265, § 304(g), 94 Stat. 441, 456 (1980). *See* D. COFER, *supra* note 6, at 117-22; *Social Security Hearings and Appeals: Pending Problems and Proposed Solutions: Hearings Before the Subcomm. on Social Security of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 10-11 (1981) [hereinafter *Pending Problems*].

104. These policies and practices are discussed in detail in Part II.B. beginning *infra* at text accompanying note 119.

105. *See* the congressional hearings cited *infra* note 127. *See also* Heaney, *Why the High Rate of Reversals in Social Security Disability Cases?*, 7 HAMLINE L. REV. 1 (1984).

106. Pub. L. No. 97-455, 96 Stat. 2497 (1983).

107. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794 (1984).

have subsided significantly in the latter half of the 1980s. An examination of caseload statistics confirms this analysis.

2. Caseload statistics

Cases filed at both the federal district and circuit court levels experienced steady growth which accelerated in the late 1970s, mushroomed in the mid-1980s, but has subsided significantly in the late 1980s. This pattern is reflected in Table 1:

Table 1: Social Security Cases Filed in Federal Court[108]

Year	District Courts			Courts of Appeals
	Total	OASDI	SSI	
1965	1,147	NA	NA	139
1966	1,091	NA	NA	136
1967	960	NA	NA	127
1968	1,188	NA	NA	89
1969	1,572	NA	NA	101
1970	1,735	NA	NA	133
1971	1,792	NA	NA	130
1972	2,288	NA	NA	210
1973	2,497	NA	NA	193
1974	2,585	NA	NA	246
1975	5,846	NA	NA	247
1976	10,355	NA	NA	293
1977	10,095	NA	NA	478
1978	9,850	NA	NA	585
1979	9,942	5,702	866	574
1980	9,043	4,795	976	627
1981	9,780	5,539	1,628	642
1982	12,812	8,002	2,378	779
1983	20,315	15,169	3,595	992
1984	29,985	24,215	4,495	1,204
1985	19,771	15,403	3,344	1,188
1986	14,407	10,778	2,670	1,178
1987	13,338	10,035	2,609	982
1988	15,412	11,412	3,044	992

108. Data is compiled from reports 1965 through 1988 of the DIRECTOR REPORT, *supra* note 88, at Tables C2 (district courts) and B1A, B3, B4, or B5 (courts of appeals). "NA" indicates that statistics were not available. The 1978 figure for court of appeals filings is the revised figure contained in the 1979 report, and the 1987 figures for district

Although these figures are large in absolute terms and represent a relatively large proportion of the federal judiciary's caseload,[109] they reflect only a small percentage of the millions of cases that move through the elaborate disability determination process each year.[110]

The caseload pattern in federal courts reflects certain trends in the administrative caseload. The administrative statistics are compiled in Table 2:

Table 2: Administrative Caseload[111]

Year	New Apps. OASDI only	CDR	Recons.	ALJ Hrg	A.C.
1974	1,330,200	NA	215,300	121,504	23,097
1975	1,285,300	NA	NA	154,962	36,677
1976	1,232,200	NA	NA	157,688	48,759
1977	1,235,200	NA	256,489	193,657	47,719
1978	1,184,700	NA	262,926	196,428	52,490
1979	1,187,800	NA	284,593	226,240	51,537
1980	1,262,300	NA	311,705	252,023	49,742
1981	1,161,300	NA	336,355	281,737	55,912
1982	1,020,000	401,182	376,767	320,680	68,935
1983	1,017,700	465,174	512,061	363,533	93,906
1984	1,035,700	156,073	403,089	271,809	85,867
1985	1,066,200	5,123	378,956	245,090	66,210
1986	1,118,400	47,737	380,356	230,655	44,700
1987	1,109,100	174,800	461,588	278,440	57,805
1988	NA	318,134	454,804	290,393	64,861

courts are the revised figures contained in the 1988 report. Specific data regarding OASDI and SSI is only available for district court cases after 1979. *See id.* at Table C2 (1981-1988), Table 30 (1980), and Table 33 (1979). Throughout the 1980s, the rate of appeal from district court decisions remained relatively constant, ranging from about four to eight percent of district court decisions terminated. For annual figures on Social Security cases terminated in district court, see *id.* at Table C3B (1981-1988).

109. *See supra* note 88.

110. Between 1965 and 1987, SSA each year made over 3 million new awards of OASDI benefits alone, peaking at 4,610,730 new awards in 1977. *See* SOCIAL SECURITY ADMIN., U.S. DEPT. OF HEALTH AND HUMAN SERV., SOCIAL SECURITY BULLETIN ANNUAL STATISTICAL SUPPLEMENT 244 (1988) [hereinafter SOCIAL SECURITY BULLETIN] (Table 6.A1). At the end of 1987, over 4 million individuals were receiving disability benefits under OASDI. *See id.* at 171 (Table 5.A5).

111. Unfortunately, neither more complete statistics nor figures reflecting a uniform statistical base were available. Table 2 is therefore a compilation of statistics from the following variety of sources:

New Applications: Statistics on new OASDI applications are taken from COMM. ON

The figures in Table 2 suggest several conclusions regarding the caseload crisis. First, the dramatic federal court caseload increases of the early and mid-1980s do not appear to be the result of an influx of new applications for benefits.[112] Second, one of the principal causes of the caseload increase was the addition of CDR cases and the subsequent administrative and judicial review of decisions to terminate benefits.[113] Third, CDR cases are probably not the complete explanation for the caseload crisis because the resumption of CDR has not always lead to corresponding caseload increases at all levels of administrative review.[114] Thus, the rate of adverse decisions must also be examined.[115] These figures are compiled in Table 3:

WAYS AND MEANS, BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 53 (1988) (Table 7) [hereinafter BACKGROUND MATERIAL]. Statistics on SSI applications were unavailable.

CDR & Reconsiderations: Statistics on CDRs and reconsiderations are taken from the SSA data prepared annually in BACKGROUND MATERIAL. *See, e.g., id.* at 50 (Table 4). Prior to 1982, the reconsideration statistics include only OASDI and concurrent OASDI and SSI cases. From 1982 on, the statistics also include pure SSI cases, although pure SSI cases now omit the reconsideration stage and go directly to an ALJ hearing. *See id.* This discontinuity in the statistical base makes it difficult to identify chronological trends in the reconsideration caseload.

ALJs and Appeals Council: Statistics on ALJ and Appeals Council caseloads were provided by SSA and reflect all programs within its jurisdiction. While specific data regarding OASDI and SSI caseloads was also available from BACKGROUND MATERIAL, as in the case of reconsideration caseloads, these statistics do not reflect a uniform base over time, and were eschewed in favor of admittedly more general statistics that do reflect a uniform base.

112. New applications for OASDI benefits remained relatively constant throughout the period. The point would be established more conclusively if statistics on new applications included SSI as well as OASDI applications, but SSI statistics were unavailable. *See supra* note 111. Nonetheless, a similar pattern is probably present for SSI applications; there is no discussion in the literature of a dramatic increase and subsequent decline in new SSI applications, nor is there any reason to suppose that SSI applications followed a different pattern than OASDI applications.

While new applications remained constant, the number of individuals receiving disability benefits under OASDI declined substantially from the peak of 4,868,490 in 1978 to a low of 3,812,991 in 1983 and has grown only slowly since that time, resting at 4,044,724 in 1987. *See* SOCIAL SECURITY BULLETIN, *supra* note 110, at 170 (Table 5.A4). This decline reflects the restrictive policies discussed below.

113. The peaks of the ALJ and Appeals Council caseloads correspond to the peaks in CDR cases. *See supra* text at Table 2.

114. For example, while CDRs increased at a dramatic rate from 1986 to 1988, ALJ caseloads actually decreased slightly from 1987 to 1988. *See supra* text at Table 2.

115. Higher rates of adverse decisions would increase the number of cases likely to be appealed by claimants.

Table 3: Unfavorable Disposition Rates[116]

Year	Initial	CDR	Recons.	ALJ	A.C.
1980	67%	NA	85%	42%	87%
1981	70%	NA	87%	42%	89%
1982	72%	45%	89%	45%	88%
1983	68%	41%	86%	47%	86%
1984	65%	24%	84%	48%	88%
1985	64%	11%	86%	48%	88%
1986	61%	6%	83%	51%	79%
1987	64%	13%	85%	45%	80%
1988	64%	12%	86%	43%	69%

The figures in Table 3 suggest that higher denial and termination rates at every level of the administrative process played a significant part in the caseload crisis. This factor appears most striking with respect to CDR termination rates which dropped dramatically from a forty-five percent peak in 1982 to thirteen and twelve percent in 1987 and 1988 respectively.[117] While the variance in rates of other categories may not appear to be statistically significant, the overall pattern is pronounced: in every category, the denial and termination rates were higher in the early 1980s than in recent years.[118]

The foregoing historical and statistical analysis suggests that the caseload crisis of the Social Security disability process came in two waves. The first wave, experienced in the latter half of the 1970s, was caused by the addition of SSI cases to the federal administrative process. Although this growth appears to have leveled off, caseloads will probably remain at least at the

116. Statistics were taken from BACKGROUND MATERIAL, *supra* note 111, § 2 (Table 4 (1981-1989)). From 1980 to 1982 the figures reflect OASDI and concurrent OASDI/SSI cases only; thereafter, they reflect all OASDI and SSI cases. The 1987 and 1988 figures for reconsideration, ALJ hearings, and Appeals Council decisions do not include review of CDR determinations.

117. These percentages tend to confirm the conclusion expressed above that the number of CDR cases alone did not explain the caseload crisis. *See supra* text accompanying note 114.

118. It is true that the ALJ denial rates actually increased in the mid-1980s before decreasing in 1987 and 1988. This anomaly can be explained in part by the lingering effects of SSA oversight efforts, *see infra* notes 195-225 and accompanying text, and in part by SSA's mid-1980s moratorium on CDR cases, which removed from the ALJ caseload a large number of cases in which ALJs frequently ruled in favor of a claimant by reversing state DDS interpretations on the basis of more favorable judicial standards for determining whether a claimant's disability continued. *See infra* notes 128-29 and accompanying text.

relatively high levels of the late 1970s. The second wave, experienced in the early and mid-1980s, was the product of the aggressive pursuit of CDR and various restrictive policies that increased the rate of decisions unfavorable to claimants. This aspect of the caseload crisis appears to have eased significantly, but resumption of CDR may cause a resurgence in caseload growth. Nevertheless, any resurgence should fall short of the dramatic increases experienced in the early and mid-1980s because the current disposition rates are more favorable to claimants, particularly with respect to CDR. Since the restrictive policies of the 1980s contributed greatly to the caseload crisis, they warrant careful examination.

B. Restrictive Policies and the Caseload Crisis

"The Reagan Administration state[d] in its fiscal year 1985 budget justification for the Social Security Administration that there [would] be 891,000 fewer disability beneficiaries in 1984 [than] in 1981."[119] Most of this pruning of the disability roles was accomplished through the SSA's aggressive pursuit of CDRs to terminate benefits.[120] In addition, SSA made it more difficult to receive benefits by strengthening the substantive standards for establishing disability.[121] Pressure was placed on disability decisionmakers to decide more cases against claimants through aggressive administrative oversight measures, including "targeting" those ALJs with high allowance rates for own-motion review by the Appeals Council.[122] The impact of these policies on the judicial caseload was exacerbated by the SSA policy of intracircuit nonacquiescence.[123] Each of these policies provoked considerable criticism and all four were eventually either struck down by the courts, abandoned or modified by SSA, or legislatively altered by Congress.

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119. *Social Security Disability Reviews: A Costly Constitutional Crisis: Hearing Before the House Select Comm. on Aging*, 98th Cong., 2d Sess. 2 (1984) [hereinafter *Costly Constitutional Crisis*] (prepared statement of Chairman Roybal).

120. *See infra* notes 124-53 and accompanying text.

121. *See infra* notes 154-79 and accompanying text. This change affected both new applications and CDRs.

122. *See infra* notes 180-225 and accompanying text.

123. *See infra* notes 226-53 and accompanying text.

1. *Continuing Disability Review (CDR)*

Responding to reports that many individuals on the Social Security disability roles were no longer disabled and also to concerns that rapid growth in the roles threatened to undermine the fiscal integrity of the Social Security system, Congress in 1980 enacted legislation requiring SSA to review cases involving non-permanent disabilities at least once every three years.[124] Although the legislation did not require the disability reviews to be implemented until January 1, 1982, the SSA under President Reagan initiated an aggressive CDR program in March of 1981.[125] By 1984, SSA had terminated the benefits of nearly 500,000 recipients.[126] Various aspects of the CDR program proved to be very controversial.[127]

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124. Social Security Disability Amendments of 1980, Pub. L. No. 96-265, § 311, 94 Stat. 441, 460 (1980) (codified as amended at 42 U.S.C. § 421(i) (1982 & Supp. V 1987)). *See* H.R. REP. No. 944, 96th Cong., 2d Sess. 60, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1338; S. REP. No. 408, 96th Cong., 1st Sess. 60-61 (1979), *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1277, 1408; Schweiker v. Chilicky, 108 S Ct. 2460 (1988); Lindh, *An Examination of the Proposed "Closed Record" Administrative Law Judge Hearing in the Social Security Disability Program*, 6 W. NEW ENG. L. REV. 745, 745 n.2 (1984).

125. *See, e.g., Chilicky*, 108 S. Ct. at 2463; *Social Security Disability Insurance Program: Cessations and Denials: Hearing Before the House Select Comm. on Aging*, 97th Cong., 2d Sess. 1 (1982) [hereinafter *Cessations and Denials*] (statement of Sen. Pepper).

126. *See, e.g., Social Security Disability Reviews: The Human Costs (Part 1): Hearing Before the Senate Special Comm. on Aging*, 98th Cong., 2d Sess. 79 (1984) [hereinafter *Human Costs (Pt. 1)*] (470,000 termination notices were sent between March 1981 and November 1983); Kubitschek, *A Re-evaluation of* Mathews v. Eldridge *in Light of Administrative Shortcomings and Social Security Nonacquiescence*, 31 ARIZ. L. REV. 53, 67 & n.101 (1989) (195,474 terminations in 1982); Stormer & Ferber, *Legal Responses to Unconstitutional Termination of Disability Benefits*, 22 IDAHO L. REV. 201, 203 (1986) (98,000 terminations in 1981 and 195,474 in 1982); Note, *Social Security Administration in Crisis: Non-Acquiescence and Social Insecurity*, 52 BROOKLYN L. REV. 89, 89 (1986) [hereinafter Note, *SSA in Crisis*] (nearly one-half million terminations between March 1981 and April 1984); Note, *Terminating Social Security Disability Benefits: Another Burden for the Disabled?*, 12 FORDHAM URB. L.J. 195, 195 (1983) [hereinafter Note, *Terminating Benefits*] (374,000 terminations between March 1981 and September 1983).

127. *See generally Costly Constitutional Crisis*, *supra* note 119; *Human Costs (Pt. 1)*, *supra* note 126; *Social Security Disability Reviews: The Human Costs (Parts 2 and 3): Joint Hearing Before the Senate Special Comm. on Aging and the Subcomm. on Social Security of the House Comm. on Ways and Means*, 98th Cong., 2d Sess. (1984) [hereinafter *Human Costs (Pts. 2, 3)*]; *ALJ Role*, *supra* note 97; *Social Security Disability Reviews: A Federally Created State Problem: Hearing Before the House Select Comm. on Aging*, 98th Cong., 1st Sess. (1983) [hereinafter *State Problem*]; *Oversight of the Social Security Continuing Reviews: Effect and Impact on Administrative Law Judges and Individual Beneficiaries: Hearing Before the Subcomm. on Civil Service, Post Office, and General Services of the Senate Comm. on Governmental Affairs*, 98th Cong., 1st Sess. (1983); *Cessations and Denials*, *supra* note 125; *Oversight of the Social*

The CDR program was intended to preserve Social Security resources by terminating the benefits of those who were no longer disabled,[128] but the program resulted in the wrongful termination of benefits to hundreds of thousands of deserving recipients.[129] States were forced to handle a vast number of CDRs without a comparable increase in their resources which led to inaccurate decisions based on poorly developed records.[130] Moreover, as one Senator put it, "the message perceived by the State agencies . . . was to deny, deny, deny . . . ."[131] While many wrongful terminations were eventually corrected, recipients often suffered irreparable harm in the meantime.[132] The public perceived the system as a faceless bureaucracy,[133] indifferent to the human suffering it caused.[134]

Security Administration Disability Reviews: A Report Prepared by the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs, 97th Cong., 2d Sess. (1982) [hereinafter *Disability Reviews*]; *Oversight of Social Security Disability Benefits Terminations: Hearing Before the Subcomm. on Oversight of Government Management of the Senate Comm. on Governmental Affairs*, 97th Cong. 2d Sess. (1982).

128. The degree to which the program actually preserved resources is unclear, since many recipients whose disability benefits were terminated ended up on state welfare roles. *See State Problem, supra* note 127, at 586-88 (State of Michigan Interagency Task Force on Disability Report); Note, *Terminating Benefits, supra* note 126, at 198-200. Moreover, the costs of processing the many termination cases that were later reversed were considerable. While the Reagan Administration predicted net savings of over one billion dollars from CDR terminations between 1982 and 1984, *see State Problem, supra* note 127, at 262 (background data prepared by Select Committee on Aging), these figures did not anticipate the significant reversal rates, *see infra* note 129 and accompanying text, or the substantial costs of litigating these cases in federal court, *see Costly Constitutional Crisis, supra* note 119, at 3 (prepared statement of Chairman Roybal).

129. *See, e.g.*, Schweiker v. Chilicky, 108 S. Ct. 2460, 2464 (1988) (SSA itself conceded that benefits were wrongfully terminated for over 200,000 recipients).

130. *See, e.g., Costly Constitutional Crisis, supra* note 119, at 5 (statement of Rep. Hammerschmidt); *id.* at 7 (prepared statement of Rep. Regula); *Weinstein, supra* note 32, at 913.

131. *See* 130 CONG. REC. S6213 (daily ed. May 22, 1984) (remarks of Sen. Cohen, cosponsor of the Social Security Disability Benefits Reform Act), *quoted in Chilicky*, 108 S. Ct. at 2464.

132. *See generally Chilicky*, 108 S. Ct. at 2464; *Cessations and Denials, supra* note 125, at 39-51; *Human Costs (Pt. 1), supra* note 126, *passim*; *Human Costs (Pts. 2-3), supra* note 127, *passim*; Kubitschek, *supra* note 126, at 67-72.

133. Since there was no opportunity for a hearing at the initial determination or reconsideration stage, *see supra* note 44, recipients' contact with the bureaucracy often consisted of initial letters informing them that their disability status was under review followed by letters informing them that their benefits had been terminated.

134. This perception was fueled by highly publicized examples of individuals whose benefits were terminated and who subsequently died of their disability or committed suicide. *See, e.g.*, Kubitschek, *supra* note 126, at 67-72. The various congressional hearings cited above, *supra* note 127, are replete with horror stories of truly disabled individ-

Two specific areas of controversy warrant further discussion. First, in conducting CDRs, SSA required the claimant to prove disability[135] and often terminated benefits by simply reevaluating the claimant's condition under new and stricter disability standards discussed more fully below.[136] Various courts rejected SSA's approach, holding that in CDR cases SSA must rebut a presumption of continuing disability by presenting substantial evidence that a claimant's condition has improved.[137] A number of states also objected to SSA's standard and some imposed statewide moratoria on CDRs.[138]

The SSA's treatment of claimants with mental impairments proved to be a second source of particular controversy.[139] Both statutes and regulations require consideration of mental impairments in determining disability.[140] Mental impairments are not always factored into the "residual functional capacity" which is determined at step four of the disability determination process and used in the grids at step five; therefore, in mental impairment cases the SSA should move off the grids and make an indi-

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uals whose benefits were abruptly terminated.

135. *See, e.g., Chilicky*, 108 S. Ct. at 2463.

136. *See id.* at 2473 (Brennan, J., dissenting) (citing H.R. REP. No. 618, 98th Cong., 2d Sess. 6-7, 10-11 (1984)). These standards included a strengthening of the "severity" requirement, disregarding mental impairments and disorders, disregarding a claimant's statements as to pain despite medical evidence of a condition that might cause pain, and refusing to consider the combined effects of impairments.

137. *See* 1 Unempl. Ins. Rep. (CCH) ¶ 12,441, at 1253-2 to 1253-7 (1989) (collecting cases); H. MCCORMICK, *supra* note 6, § 680, at 530 (Supp. 1989) (collecting cases). *See generally* Mezey, *Policymaking by the Federal Judiciary: The Effects of Judicial Review on the Social Security Disability Program*, 14 POL'Y STUD. J. 342, 351 (1986); Note, *SSA in Crisis*, *supra* note 126, at 98-103; Note, *Terminating Benefits*, *supra* note 126, at 200-10 (discussing split in authority). Although SSA refused to acquiesce to judicial decisions imposing a medical improvement standard, *infra* note 233 and accompanying text, Congress later adopted a medical improvement standard. *See infra* note 149 and accompanying text.

138. *See* S. MEZEY, *supra* note 6, at 150-53.

139. *See* City of New York v. Heckler, 578 F. Supp. 1109 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* Bowen v. City of New York, 476 U.S. 467 (1986); Mental Health Ass'n v. Schweiker, 554 F. Supp. 157 (D. Minn. 1982), *aff'd sub nom.* Mental Health Ass'n v. Heckler, 720 F.2d 965 (8th Cir. 1983); *Social Security Reviews of the Mentally Disabled: Hearings Before the Senate Special Comm. on Aging*, 98th Cong., 1st Sess. (1983) [hereinafter *Reviews of the Mentally Disabled*]; Weinstein, *supra* note 32, at 918-23.

140. *See* 42 U.S.C. § 423(d)(1)(A) (1982) ("The term 'disability' means inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ."); *id.* at § 1382c(a)(3)(A) ("An individual shall be considered to be disabled . . . if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment . . . ."); Bowen v. City of New York, 476 U.S. 467, 470 (1986) (discussing then applicable regulations).

vidualized determination of whether a claimant can perform work that exists in the national economy.[141]

Despite the statutory and regulatory mandate requiring SSA to take mental impairments into account, in 1984 a federal district court found that the SSA had consistently followed an illegal and clandestine policy that conclusively presumed mentally disabled claimants retained the capacity to perform unskilled work if their impairments did not meet or exceed the listing of impairments used at step three of the determination process.[142] Moreover, statistics suggest that claimants with mental impairments were being singled out for CDR.[143] Taken together these findings are particularly disconcerting. Indeed, the effects of terminating benefits can be especially devastating for claimants with mental disabilities because they often lack the ability to pursue the appellate process effectively.[144]

Congress soon acknowledged this inequity and acted to ameliorate the CDR problem.[145] In 1982, Congress enacted legislation providing for the continued receipt of benefits pending review of the termination decision[146] and giving recipients subject to CDR the right to a disability hearing at the reconsideration stage.[147] Moreover, the Social Security Disability Benefits Re-

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141. *See supra* note 20 and accompanying text.

142. *See* City of New York v. Heckler, 578 F. Supp. 1109, 1115 (E.D.N.Y.), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* Bowen v. City of New York, 476 U.S. 467 (1986). The district court concluded further that this policy led to "tainted" residual functioning capacity assessments by state DDS physicians, which were subsequently given great weight by ALJs in the administrative appeals process. *See supra* note 17 and accompanying text.

143. While approximately 11% of OASDI and 18% of SSI recipients' primary impairment is mental, over 25% of all CDRs involved mental impairments. *See Reviews of the Mentally Disabled*, *supra* note 139, at 164-65.

144. *See, e.g.*, Weinstein, *supra* note 32, at 922. Moreover, the termination of benefits themselves may adversely affect a mentally impaired recipient's condition. *See id. But see Human Costs (Pt. 3)*, *supra* note 127, at 29 (testimony of Dr. Kolb) (suggesting that mentally impaired claimants may be helped by returning to work).

145. *See generally* Collins & Erfle, *Social Security Disability Benefits Reform Act of 1984: Legislative History and Summary of Provisions*, SOC. SEC. BULL. 5, 11-30 (Apr. 1985) (describing legislative response to CDR program).

146. The initial legislation provided for continuation of benefits pending ALJ review on a temporary basis through June 1984. *See* Pub. L. No. 97-455, § 2, 96 Stat. 2497, 2498 (1983); Pub. L. No. 98-118, § 2, 97 Stat. 803, 803 (1983). Continuation of benefits was extended through January 1, 1988, for OASDI and on a permanent basis for SSI in the Social Security Benefits Reform Act of 1984, Pub. L. No. 98-460, § 7, 98 Stat. 1794, 1803-04 (1984). *See* Schweiker v. Chilicky, 108 S. Ct. 2460, 2463 (1988). It was again extended through June 1989 for OASDI cases in the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, § 9009, 101 Stat. 1330, 1330-293 (1987).

147. *See supra* notes 44-50 and accompanying text. This program was legislatively

form Act of 1984[148] established that before a decision to terminate benefits can be sustained, there must be substantial evidence that the claimants' condition has improved; thus, the statute adopted the medical improvement standard imposed by the courts.[149] The Act also placed a moratorium on CDRs of mental impairment cases pending promulgation of new regulations regarding mental disorders,[150] thereby codifying a moratorium on all CDRs that had previously been announced voluntarily by SSA in an effort to stave off such legislative changes.[151] Since the regulations are now in place,[152] the CDR moratorium has been lifted.[153]

2. *Substantive standards*

Various SSA policies and regulatory changes applicable to both new applications and CDRs made it more difficult for

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mandated only with respect to OASDI cases, but extended by the SSA per regulation to SSI cases. *See supra* note 44.

148. Pub. L. No. 98-460, 98 Stat. 1794 (1984) (codified in scattered sections of 42 U.S.C.). The statute also addresses other controversial aspects of SSA disability determinations discussed below.

149. *Id.* § 2 (codified at 42 U.S.C. § 423(f) (1982 & Supp. V 1987)). The Act is to some degree a compromise between judicial and administrative standards. While the principal basis for terminating benefits is medical improvement, the statute allows termination under other circumstances, including medical or vocational therapy advances that allow the claimant to engage in substantial gainful activity; new or improved diagnostic techniques indicating that a claimant was not disabled at the time or a previous disability determination; or new or record evidence demonstrating that a prior determination was in error. While these provisions are broader than an absolute requirement of a medical improvement, merely reevaluating a claimant's condition under new legal standards would not appear to be sufficient.

Likewise, the statute compromises by rejecting the judge-made presumption of continuing disability; CDR standards are to be applied "on a neutral basis with regard to the individual's condition, without any initial inference as to the presence or absence of disability being drawn from the fact that the individual has previously been determined to be disabled." *Id. See generally* H. McCormick, *supra* note 6, § 44, at 102-04 (Supp. 1989). Despite this language, however, the requirement of substantial evidence of medical improvement essentially places the burden of proof on SSA, because the failure to place evidence in the record works to the benefit of the claimant. *See supra* note 39 and accompanying text.

150. *See* Pub. L. No. 98-460, § 5, 98 Stat. 1794, 1801-02 (1984) (codified at 42 U.S.C. § 421 (1982 & Supp. V 1987)).

151. *See* Soc. Sec. Rul. 84-13; *Costly Constitutional Crisis*, *supra* note 119, at 160-63 (reprinting news release issued by SSA); Collins & Erfle, *supra* note 145, at 27.

152. *See* 20 C.F.R. §§ 404.1588-.1599 (1989) (OASDI); *id.* §§ 416.988-.999 (SSI).

153. *See* Social Sec. Admin. Ann. Rep. to the Congress 11 (1987). The report states that ALJ caseloads are expected to rise as a result of this resumption. *See id.* at 14. That expectation is confirmed to some degree by Table 2. *See supra* text accompanying note 111.

claimants to establish disability in the 1980s. In addition to the treatment of claimants with mental disabilities,[154] two other policies were of particular importance: first, SSA's application of its "severity" regulation; and second, SSA's treatment of subjective claims of pain.

The severity regulation applies at step two of the disability determination process and provides that if a claimant does not have a medically determinable impairment which significantly limits his or her ability to work, SSA will deny benefits without regard to age, education, or work experience.[155] Although SSA had long had some form of threshold severity requirement in place to screen out frivolous claims,[156] it was applied much more strictly in the early 1980s. In particular, SSA vastly expanded the number of impairments that were regarded as non-severe,[157] disregarded the relationship between a particular impairment and a claimant's prior work,[158] and refused to consider the combined effects of impairments that were regarded individually as non-severe.[159]

The effects of these policies were dramatic. The percentage of denials at step two rose from approximately eight percent in 1975 to forty percent in 1982.[160] In many cases such denials in-

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154. *See supra* notes 139-44 and accompanying text. The policy of disregarding mental impairments at step five of the disability determination process applied to both new applications for benefits and CDR. It was discussed in connection with CDR because the policy became an integral part of the CDR controversy.

155. The regulation provides, "If you do not have any impairment . . . which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education, and work experience." 20 C.F.R. § 404.1520(c) (1989) (OASDI); *id.* § 416.920(c) (SSI).

156. *See, e.g.*, Bowen v. Yuckert, 482 U.S. 137, 148 (1987).

157. *See* Soc. Sec. Rul. 82-55 (listing impairments regarded as per se non-severe); *State Problem, supra* note 127, at 554-55 (State of Michigan Interagency Task Force on Disability Report).

158. *See* Soc. Sec. Rul. 82-56 (providing that benefits may be denied under the severity regulation even if an impairment prevents the claimant from performing past work); Stone v. Heckler, 752 F.2d 1099, 1103-06 (5th Cir. 1985).

159. *See* 20 C.F.R. § 404.1522 (1989) (OASDI); *id.* § 416.922 (SSI) (SSA will consider combined effects of impairments only if all are severe); Soc Sec. Rul. 82-55 ("Inasmuch as a non-severe impairment is one which does not significantly limit basic work-related functions, neither will a combination of two or more such impairments significantly restrict the basic work-related functions needed to most jobs."). *See generally* McDonald v. Secretary of Health and Human Serv., 795 F.2d 1118, 1126-27 (1st Cir. 1986). SSA's position was aptly described by one federal district court as the equivalent of a mathematician's proving "that because two does not equal four, two plus two never equals four either." Dixon v. Heckler, 589 F. Supp. 1494, 1508 (S.D.N.Y. 1984).

160. *See, e.g., Yuckert*, 482 U.S. at 157 (O'Connor, J., concurring); *McDonald*, 795

volved claimants who obviously appeared to be disabled.[161] The most striking aspect of such cases is not merely that benefits were denied but that they were denied on the basis of a threshold requirement which was supposedly intended to screen out only frivolous claims. Not surprisingly, the application of the severity regulation created an uproar. A number of courts held the regulation was facially invalid because it precluded consideration of vocational factors as required by the statute; other courts imposed a narrowing construction on the regulation, requiring SSA to consider vocational factors in assessing the severity of impairments.[162] The Supreme Court upheld the facial validity of the regulation in *Bowen v. Yuckert*,[163] but did not resolve the question of whether a narrowing construction was required.[164]

Eventually, both congressional and administrative action eased SSA's application of the severity regulation. In the Social Security Disability Benefits Reform Act of 1984, Congress required SSA to consider the combined effect of multiple impairments.[165] Although Congress took no other action regarding

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F.2d at 1124; Baeder v. Heckler, 768 F.2d 547, 552 (3d Cir. 1985).

161. *See, e.g.*, Estran v. Heckler, 745 F.2d 340 (5th Cir. 1984) (SSA concluded that depressive neurosis, somatization disorder, hypertrophic arthritis, and angina were non-severe impairments in a 58 year-old illiterate woman with an I.Q. of 69); Brady v. Heckler, 724 F.2d 914 (11th Cir. 1984) (SSA concluded that hypoglycemia, emphysema, pericarditis, dizzy spells, fainting, and depression were non-severe impairments in a 47 year-old man with a 10th grade education).

162. These cases are cited in Justice O'Connor's concurring opinion in Bowen v. Yuckert, 482 U.S. 137, 156 nn.1-2 (1987).

163. 482 U.S. 137 (1987). The Court reasoned that the regulation was not facially inconsistent with statutory requirements, and that Congress had implicitly approved the regulation by refusing to disturb it in subsequent legislation. *Id.* at 145-52.

164. *See id.* at 154 n.12. Nonetheless, it is possible to read the case as requiring a narrowing construction. While the majority opinion did not address the question of whether a narrowing construction was necessary to sustain the regulation, Justices O'Connor and Stevens wrote separately to emphasize that SSA may not "deny benefits to a claimant who may fit within the statutory definition without determining whether the impairment prevents the claimant from engaging in either his prior work or substantial gainful employment that, in light of the claimant's age, education, and experience, is available to him in the national economy." *Id.* at 158 (O'Connor, J., concurring). The concurring Justices concluded, however, that as applied under Social Security Ruling 85-28, the regulation was consistent with this mandate. *Id.* at 158-59. *See infra* note 169 and accompanying text (discussing Soc. Sec. Rul. 85-28). The concurring opinion implies that the narrowing construction imposed by 85-28 is necessary to the validity of the regulation. This view appears to be controlling, because the votes of Justices O'Connor and Stevens were necessary to form a majority for sustaining the regulation—Justices Blackmun, Brennan and Marshall dissented. *Yuckert*, 482 U.S. at 159-81 (dissent).

165. Pub. L. No. 98-460, § 4, 98 Stat. 1794, 1800-01 (1984) (codified at 42 U.S.C. § 423(d)(2)(C) (Supp. V. 1987)). *See* H.R. CONF. REP. No. 1039, 98th Cong., 2d Sess. 29-30, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3080, 3087-88.

SSA's use of the severity regulation,[166] the legislative history evinced "concern" that SSA had applied the regulation without considering vocational factors,[167] and urged "that all due consideration be given [by SSA] to revising [the severity] criteria to reflect the real impact of impairments upon the ability to work."[168] Perhaps responding to this congressional concern, the SSA modified its application of the severity requirement in Social Security Ruling 85-28, which provides that when the effect of an impairment or combination of impairments on an individual's ability to do basic work activities is unclear, the adjudicator must "evaluate the individual's ability to do past work, or to do other work based on the consideration of age, education, and prior work experience."[169]

The second controversial policy leading to the denial of benefits was SSA's treatment of a claimant's subjective symptoms, especially pain. Under regulations adopted in 1980, a claimant's subjective statements regarding symptoms cannot establish an impairment; instead, an "impairment must result from anatomical, physiological, or psychological abnormalities which can be shown by medically acceptable clinical and laboratory diagnostic techniques."[170] Although the language of these regulations did not differ substantially from those previously in place regarding

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166. Congress apparently refrained from acting in order to give SSA the opportunity to revise its policies. The House Report noted that "the Secretary [of HHS] has already planned to re-evaluate current criteria for non-severe impairments . . . ." H.R. REP. No. 618, 98th Cong., 2d Sess. 8, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 3038, 3045.

167. The Report stated, "It is of particular concern that the Social Security Administration has been criticized for basing terminations of benefits solely and erroneously on the judgment that the person's medical impairment is 'slight,' according to very strict criteria, . . . without making any further evaluation of the person's ability to work." *Id.* at 7, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3045.

168. *Id.* at 8, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3045.

169. *Yuckert*, 482 U.S. at 158 (O'Connor, J., concurring). It was this narrowing construction that prompted Justices O'Connor and Stevens to conclude that the regulation was valid as applied. *See supra* note 164. Other aspects of SSA's application of the regulation were modified as well. The listing of non-severe impairments in Social Security Ruling 82-55 was " 'obsoleted without replacement' " by Social Security Ruling 85-III-II. McDonald v. Secretary of Health and Human Serv., 795 F.2d 1118, 1125 n.8 (1st Cir. 1986). *See also id.* (Social Security Ruling 86-8 replaces prior Social Security Ruling 82-56, discussed *supra* note 158 and accompanying text).

170. 20 C.F.R. § 404.1508 (1989) (OASDI). *See id.* § 416.908 (SSI). *See also id.* § 404.1528 (OASDI) (symptoms are claimant's description of an impairment, which alone are insufficient to show the impairment); *id.* § 416.928 (SSI) (same); *id.* § 404.1529 (OASDI) (pain must be evaluated on the basis of a medically determinable impairment which can be shown to be its cause); *id.* § 416.929 (SSI) (same).

the evaluation of symptoms such as pain, under Social Security Ruling 82-58 their interaction with the severity regulation gave them a new significance: subjective symptoms were regarded as irrelevant in determining the severity of an impairment.[171] The denial of benefits as the result of disregarding statements of pain led to a plethora of court decisions denouncing SSA's policy.[172]

Congress responded to the confusion surrounding the evaluation of pain in the Social Security Disability Benefits Reform Act of 1984. The Act provides that a claimant's subjective statements as to pain "shall not be alone conclusive evidence of disability" but that "there must be medical signs and findings, established by medically acceptable clinical or laboratory diagnostic techniques, which show the existence of a medical impairment . . . which could reasonably be expected to produce the pain . . . alleged . . . ."[173] While this language more or less follows the SSA's regulations, the statute provides further that "statements of the individual or his physician as to the intensity and persistence of such pain . . . which may reasonably be accepted as consistent with the medical signs and findings" must be considered.[174] As a result of these provisions, the claimant must establish a medically demonstrable *cause* of his or her pain. Once such a cause has been established, SSA must consider statements regarding the *intensity* of the pain, so long as they are consistent with that cause. Under the Act, these provisions were temporary pending the submission of a report by the Commission on the Evaluation of Pain,[175] but the SSA has continued them as a matter of policy.[176]

The statutory provisions did not end the dispute between

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171. The Ruling stated that "[w]hen a medically determinable severe impairment cannot be established on either a physical or a mental basis, *the claim must be denied*, regardless of the intensity of the symptom . . . ." Soc. Sec. Rul. 82-58. *See generally* Goldhammer & Bloom, *supra* note 23, at 452-561.

172. Many of these opinions are described in Goldhammer & Bloom, *supra* note 23, at 461-73. *See also* 2 H. McCORMICK, *supra* note 6, § 679; *id.* § 679 (Supp. 1989).

173. Pub. L. No. 98-460, § 3(a)(1), 98 Stat. 1794, 1799 (1984) (codified at 42 U.S.C. § 423(d)(5) (Supp. V 1987)).

174. *Id.*

175. *See id.* at § 3(a)(3) (sunset provision providing for application only prior to January 1, 1987); *id.* at § 3(b) (creating the Commission on Evaluation of Pain and providing for the submission of a report). The report has since been prepared. EVALUATION OF PAIN, *supra* note 23.

176. *See* Soc. Sec. Rul. 88-13, *reprinted in* H. McCORMICK, *supra* note 6, § 679, at 462-66 (Supp. 1989).

SSA and the courts, however. Following the adoption of the statute, SSA continued to apply Social Security Ruling 82-58 to require that a claimant show objective medical evidence to support the intensity of pain asserted by the claimant's subjective statements.[177] This requirement appears to be inconsistent with the statutory provision directing SSA to consider subjective statements of the intensity of pain since such a provision would be inappropriate if objective evidence of intensity were necessary.[178] Ultimately, SSA modified or clarified its policy to recognize that subjective symptoms may cause a greater degree of impairment than medical evidence alone would suggest.[179]

3. Administrative oversight

In addition to the application of the various restrictive legal standards described above, several SSA practices designed to oversee state DDSs and ALJs appear to have increased the number of disability benefit denials and terminations. While many of these practices stemmed from laudable efforts to improve the timeliness, accuracy, and consistency of disability determinations,[180] in practice they produced inconsistent decisional standards and threatened the impartiality of disability determinations. Overall, they contributed to a climate in which those responsible for making disability determinations were pressured to process claims quickly and deny benefits whenever possible.[181]

a. State DDSs. The SSA ensures the quality and consistency of state DDS determinations through two principal mech-

177. *See, e.g.*, Foster v. Heckler, 780 F.2d 1125 (4th Cir. 1986). *But cf.* Avery v. Secretary of Health and Human Serv., 797 F.2d 19, 21-22 (1st Cir. 1986) (Social Security Ruling 82-58 is internally inconsistent on whether there must be medical evidence of intensity of pain.).

178. *See Foster*, 780 F.2d at 1129; Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984); Green v. Schweiker, 749 F.2d 1066 (3d Cir. 1984). Despite this apparent inconsistency between SSA policy and the statute, SSA initially defended its position by referring to legislative history stating "that Congress intended to adopt 'the present regulatory policy on the use of evidence of pain in the evaluation of disability.'" *Avery*, 797 F.2d at 21 (quoting 130 CONG. REC. H9829 (daily ed. Sept. 19, 1984)). The *Avery* court did not consider this language dispositive. *See id.*

179. *See* Soc. Sec. Rul. 88-13. *See also Avery*, 797 F.2d at 22-24 (challenge to Social Security Ruling 82-58 mooted by adoption of new Program Operations Manual System instructions reflecting new SSA interpretation); Polaski v. Heckler, 739 F.2d 1320 (8th Cir. 1984), *vacated*, 476 U.S. 1167 (1986) (approving settlement agreement expressing new interpretation).

180. *See supra* notes 94-107 and accompanying text.

181. *See, e.g.*, Schweiker v. Chilicky, 108 S. Ct. 2460, 2464 (1988) (pressure in CDR program).

anisms. First, SSA provides the Program Operating Manual System (POMS) which contains binding written guidelines for state DDS disability determinations.[182] Second, SSA conducts Quality Assurance Reviews (QAR) of some state DDS determinations before they enter into effect.[183] While SSA oversight of state DDSs may be desirable in theory, in practice SSA's methods threatened decisional fairness at the state level.

The POMS is intended to clarify and interpret SSA policy so that it may be applied correctly by the state DDS. In some instances, however, "there are glaring examples of POMS provisions which are in direct conflict with the statutes or regulations and with Federal court decisions interpreting the Social Security Act."[184] The result is that state DDSs follow decisional standards that vary from those followed by ALJs,[185] who consider themselves bound only by statutes, regulations, and court decisions.[186] Moreover, the use of the POMS to make policy is questionable because POMS guidelines are not subject to public comment prior to their adoption.[187] Finally, POMS guidelines are not generally available to the public and therefore claimants

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182. *See* 20 C.F.R. § 1633(b) (1989) (OASDI); *id.* § 1033(b) (SSI).

183. *See supra* note 40.

184. D. COFER, *supra* note 6, at 125. Inconsistencies between POMS provisions and court decisions is mainly caused by SSA's policy of nonacquiescence in federal court decisions. *See infra* note 240 and accompanying text.

185. H.R. REP. No. 618, *supra* note 166, at 20-21, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3057-58; D. COFER, *supra* note 6, at 124-29. The House version of the 1984 legislation contained provisions designed to eliminate these inconsistencies by requiring SSA to employ notice and comment rulemaking under 5 U.S.C. § 553 for substantive rules affecting disability determinations. The provision would have allowed SSA to issue "interpretive" rules without following § 553 procedures. *See* H.R. REP. No. 618, *supra* note 166, at 21-22, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3058-59. In conference, the House provision was eliminated, but the conferees "urge[d] the Secretary to publish under APA public notice and comment rulemaking procedures all OASDI and SSI regulations which relate to benefits." H.R. CONF. REP. No. 1039, *supra* note 165, at 36, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3094.

186. *See Appeals Council Report*, *supra* note 3, at 688 n.180. While SSA does not purport to bind ALJs to the POMS, regulations provide that Social Security Rulings "are binding on all components of the [Social Security] Administration." 20 C.F.R. § 422.408 (1989). Since some of the more controversial SSA policies have been implemented pursuant to Social Security Rulings, *see, e.g.*, *supra* notes 154-79 and accompanying text (implementation of the "severity" requirement; evaluation of pain), the disagreement over the legal force of Social Security Rulings has been a source of tension between SSA and its ALJs. *See Appeals Council Report*, *supra* note 3, at 688 n.180.

187. *See* H.R. REP. No. 618, *supra* note 166, at 20-21, 1984 U.S. CODE CONG. & ADMIN. NEWS at 3057-58; D. COFER, *supra* note 6, at 125; S. MEZEY, *supra* note 6, at 58.

are being judged according to decisional standards of which they have no notice.[188]

The QARs were mandated by the 1980 amendments to the Social Security Act[189] and are conducted at the state, regional, and national levels.[190] While QARs were intended to assure the accuracy of state DDS disability determinations, in practice they placed considerable pressure on DDSs to deny benefits. First, statutory provisions required SSA to conduct reviews of DDS decisions granting benefits but did not contain a similar requirement for DDS decisions denying benefits and therefore there was a built-in bias in the system.[191] Second, to the extent that regional and national level review reflected an apparent SSA policy favoring denial of benefits,[192] states had "strong incentive" to comply with the apparent policy "because quite serious consequences to the careers and bureaucratic standing of individuals [could] follow if they persist[ed] in making 'mistakes.' "[193] Confronted with a system that virtually exempted decisions denying benefits from QAR and with various indications that SSA wanted state DDSs to deny benefits, state deci-

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188. *See* D. COFER, *supra* note 6, at 125; S. MEZEY, *supra* note 6, at 58. *But see Appeals Council Report*, *supra* note 3, at 689 (the POMS "is not 'published' in the Federal Register but is generally available for public review at SSA offices"). The failure to make eligibility requirements public may present some due process difficulties. *See, e.g.*, Morton v. Ruiz, 415 U.S. 199, 231 (1974).

189. *See supra* note 102 and accompanying text. Prior to the 1980 legislation, Quality Assurance Reviews were conducted under the administrative initiative of the Bureau of Hearings and Appeals. *See supra* notes 94-95 and accompanying text.

190. *See* Weinstein, *supra* note 32, at 919-20. When a regional or national level review reveals an error, the case is returned to the state. *Id.* at 920. Such returns have a precedential effect, guiding the state in the operation of its DDS and in conducting its own Quality Assurance Review. *Id.*

191. *See State Problem*, *supra* note 127, at 522 (statement of Margaret Heckler, then Secretary of HHS). SSA responded to this problem by voluntarily conducting review of some state decisions disallowing benefits and proposing legislation providing for conduct of review on a neutral basis. *See id.* at 522, 530.

192. While SSA has denied any such policy, the overall impact of the specific regulations and practices described above certainly suggests one. Indeed, there is every indication that, at one time at least, SSA viewed the principal goal of Quality Assurance Review to be the reduction of the disability roles. *See* D. COFER, *supra* note 6, at 116 ("Obviously the pervasive spirit of pre-effectuation review, and continuing disability investigations in particular, was to diminish the number of disability claimants . . . .").

193. *Id.* Thus the SSA's policy regarding mental disabilities, *see supra* notes 139-53 and accompanying text, was implemented in part through the Quality Assurance Review process. *See* City of New York v. Heckler, 578 F. Supp. 1109, 1114 (E.D.N.Y. 1984), *aff'd*, 742 F.2d 729 (2d Cir. 1984), *aff'd sub nom.* Bowen v. City of New York, 476 U.S. 467 (1986); Weinstein, *supra* note 32, at 920-21.

sionmakers could avoid trouble by simply denying benefits whenever possible.[194]

b. ALJs. Although SSA oversight of ALJs may be justified generally in terms of the need for accountability, SSA oversight may also threaten ALJs' decisional independence.[195] Nonetheless, prompted by high ALJ allowance rates, inconsistent rates at which ALJs reversed state DDSs, and problems of delay, Congress directed SSA to evaluate and improve ALJ performance.[196] The SSA pursued the objectives through a variety of methods including SSA-initiated review of ALJ decisions granting benefits, production "goals", and disciplinary actions.[197] The implementation of these programs strained relations between SSA and its ALJs and pressured ALJs to deny benefits.[198]

The "Bellmon Amendment" to the Social Security Disabil-

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194. *See, e.g., Costly Constitutional Crisis, supra* note 119, at 92 (letter from Governor of Alabama); *State Problem, supra* note 127, at 555 (State of Michigan Interagency Task Force on Disability Report).

195. *See generally Disability Reviews, supra* note 127; *ALJ Role, supra* note 97. For discussion of administrative oversight as it relates to ALJs generally, see Note, *Administrative Law Judges, Performance Evaluation, and Production Standards: Judicial Independence Versus Employee Accountability*, 54 GEO. WASH. L. REV. 591 (1986).

196. Administrative efforts began during the latter half of the 1970s under the tenure of Robert Trachtenberg as Director of the Bureau of Hearings and Appeals (now Office of Hearings and Appeals). *See supra* notes 94-98 and accompanying text; D. COFER, *supra* note 6, at 75-110. The 1980 Amendments to the Social Security Act reflected similar concerns, and were implemented vigorously by SSA in the 1980s.

197. In addition to these methods, discussed more fully below, the consistent message perceived by ALJs was that SSA sought a reduction in the reversal rate (the rate at which ALJs reversed state DDSs and granted benefits). Apparently this message was perceived by some ALJs from the onset of their employment with SSA. As one ALJ described it:

> On my second day as an Administrative Law Judge, my "class" was addressed by Rhoda Greenberg, then Director of the Office of Disability Programs. In her remarks she informed us that the State Agencies were correct 95% of the time. I, along with many other Judges felt that this was, in effect, a statement that most claims deserved to be denied. . . .
>
> Throughout the orientation session . . . the lecturers, while imparting their vast knowledge of the law and regulations to the new judges, argued with us on mock cases, attempting to convince us that they should not be granted.

ALJ Role, supra note 97, at 295 (statement of Joyce Krutick Barlow).

198. Officials within SSA maintained that there was no pressure on ALJs to deny benefits. *See ALJ Role, supra* note 97, at 21 (testimony of Louis B. Hays, Associate Commissioner for Hearings and Appeals) ("It would be my impression based on travels around the country and my personal discussions with the great majority of our 800 administrative law judges that in fact the average administrative law judge does not feel under pressure to deny benefits."). However, 70% of ALJs responding to an independent survey indicated that they believed there was agency pressure to deny benefits. *See id.* at 73 (statement by Charles N. Bono, President of the Association of Administrative Law Judges, describing the results of the survey on behalf of the Association).

ity Amendments of 1980 required the Appeals Council to review ALJ decisions granting benefits.[199] The SSA's implementation of the requirement generated considerable controversy. The SSA's initial practice was to "target" those ALJs with high rates of disability allowances for more extensive review.[200] The impact of such targeting was obvious. First, it reflected SSA's apparent view that a high rate of allowances indicated a high rate of ALJ error.[201] However, since ALJs and state DDSs were bound by different standards,[202] and since many ALJs felt obliged to follow judicial decisions in which SSA had refused to acquiesce,[203] this assumption is not necessarily correct.[204] Second and more

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199. *See supra* note 103 and accompanying text. In addition to mandating ongoing review, the Amendment required the Secretary of HHS to make a progress report to Congress by January 1982. This report, known as the Bellmon Report, is reprinted in its entirety in the Social Security Bulletin at 3-27 (May 1982). The Bellmon Report generally justifies the targeting of high allowance ALJs for review on the basis of a higher "error" rate among those ALJs. Since this conclusion is based upon the assumption that any disagreement between an ALJ and the Appeals Council reflects ALJ error, this higher error rate may simply reflect a more restrictive posture towards disability held by the Council, rather than any objective measurement of ALJ accuracy.

200. The targeting of ALJs went through two phases. In the first phase of targeted review, which was limited to 7.5% of disability allowance decisions, ALJs or Hearing Offices were targeted for review if their allowance rate was greater than or equal to 70% or 74% respectively. Fifty percent of a targeted ALJ's decisions were reviewed. In the second phase, which extended to 15% of allowance decisions, targeted ALJs were divided into four groups, subject to 100%, 75%, 50%, or 25% review, depending on the frequency that the Appeals Council took action to correct their decisions. As the rate of Appeals Council action to correct ALJ decisions declined, the rate of review declined as well. During the second phase, review was also conducted for all new ALJs, on the basis of random sampling, and in cases of office of disability operation protest. *See generally* Memorandum to All Administrative Law Judges from Louis B. Hays, Associate Commissioner of Hearings and Appeals (Sept. 24, 1982), *reprinted in ALJ Role*, *supra* note 97, at 204-07.

201. This assumption by SSA may simply reflect a similar assumption embodied in the legislation, but it also seems to be part of a broader tendency by the agency to assume that allowances are likely to reflect error. Indeed the agency has suggested that this assumption is appropriate because allowances are more prone to error than denials. *See Disability Insurance Legislation*, *supra* note 92, at 235-40 (statement of Commissioner Ross). *See also ALJ Role*, *supra* note 97, at 25 (according to Louis B. Hays, the Appeals Council finds error more frequently in ALJ decisions granting benefits than in decisions denying benefits); Bellmon Report, *supra* note 199, at 3 (same).

202. The POMS binds states' DDS but not ALJs. *See supra* note 185 and accompanying text.

203. *See infra* note 240 and accompanying text.

204. Indeed, even without the problem of inconsistent standards, it is entirely possible that ALJ reversal reflects error by the state DDS, *see* J. MASHAW, *supra* note 6, at 87 (discussing variation in grant and denial rates at state DDSs), particularly since the claimant's first opportunity for a hearing comes at the ALJ stage. Moreover, additional evidence may be developed between the DDS determination and/or reconsideration and the ALJ hearing. *See* HEARINGS AND APPEALS, *supra* note 4, at 49; *Appeals Council Re-*

important, targeting high allowance ALJs provides an incentive for ALJs to deny benefits in order to avoid review, at least in close cases.[205]

Targeting ALJs with high allowance rates for "Bellmon Review" produced considerable litigation.[206] Two cases are of particular importance. First, in *Association of Administrative Law Judges, Inc. v. Heckler*, the District Court for the District of Columbia concluded that targeted review of high-allowance ALJs, coupled with memoranda advising ALJs that other steps would be taken if their performance did not improve, threatened the decisional independence of ALJs.[207] Second, in *W.C. v. Bowen*, the Court of Appeals for the Ninth Circuit concluded the targeted review program was a "substantive" or "legislative" rule that had been adopted in violation of the notice and comment procedures of the Administrative Procedure Act.[208] In reaching this conclusion, the court relied in part on a district court finding that the program was intended to and did alter ALJ decisions.[209]

Faced with large caseload backlogs and considerable delays in processing cases, SSA sought to increase ALJ productivity by

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port, supra note 3, at 756, 759.

205. *See* W.C. v. Bowen, 807 F.2d 1502, 1505 (9th Cir.), *modified*, 819 F.2d 237 (9th Cir. 1987) (relying on the district court finding that the review program "caused [ALJs] to deny benefits in close cases where benefits might previously have been granted"). *See also* Barry v. Heckler, 620 F. Supp. 779, 782 (N.D. Cal. 1985) (Bellmon Review affects impartiality of ALJs); Stieberger v. Heckler, 615 F. Supp. 1315, 1398 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986) (finding that the implementation of Bellmon Review affected ALJs' ability to exercise independence, but declining relief because SSA had curtailed targeting of high-allowance ALJs); Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132, 1143 (D.D.C. 1984) (finding a threat to impartiality from Bellmon Review, but declining injunctive relief because SSA curtailed targeting of high-allowance ALJs); Gaines v. Heckler, TY-81-94-CA (E.D. Tex. May 10, 1985) (Bellmon review placed impartiality at risk).

206. *See* cases cited *supra* note 205.

207. 594 F. Supp. 1132 (D.D.C. 1984). The court nevertheless declined to grant injunctive relief because SSA had altered its policy to engage in review on a random sample basis.

208. 807 F.2d 1502 (9th Cir.), *modified*, 819 F.2d 237 (9th Cir. 1987). As a result of the targeted review program's invalidity, the lower court ordered and the court of appeals affirmed the reinstatement of benefits for all claimants whose benefits were denied by the Appeals Council upon review under the targeted review program. *Id.* at 1505-06. While this remedy is perhaps the logical result of the program's invalidity, it seems inadequate. One defect in the program was that it caused ALJs to deny benefits that otherwise would have been granted. The reinstatement of benefits denied by the Appeals Council provides no relief to claimants that lost close cases before ALJs whose impartiality had been compromised.

209. *Id.* at 1505.

setting monthly case disposition "goals" for ALJs.[210] This practice began in 1976 with a twenty-six case per month goal[211] but was terminated in 1979 as the result of the settlement of a lawsuit in which ALJs challenged various management techniques implemented in the latter half of the 1970s.[212] In the early 1980s, however, the Office of Hearings and Appeals set another goal of forty-five cases per month.[213] ALJs opposed the production goals, arguing they compromised their independence and the quality of their decisions.[214]

The SSA's efforts to improve the accuracy (or increase the denials of benefits) and quantity of ALJ decisions were enforced through various mechanisms.[215] One controversial method was SSA's efforts to discipline specific ALJs. During the late 1970s and early 1980s, SSA brought a number of disciplinary actions before the Merit System Protection Board[216] including several cases in which SSA sought to have an ALJ removed from office on grounds of inadequate productivity. The Board rejected these grounds as a basis for discipline.[217] Nevertheless, even though

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210. *See* D. COFER, *supra* note 6, at 140; *ALJ Role*, *supra* note 97, at 466 (memorandum sent to ALJs in 1981 listing OHA objectives, including the goal to "[a]chieve a disposition rate of 40 per month per judge by September 1982; 45 per month per judge by September 1983."). SSA officials maintain that such expectations do not constitute production goals, but merely predictions of what could be achieved by ALJs. *See id.* at 23-24 (testimony of Louis B. Hays, Associate Commissioner for Hearings and Appeals). When such expectations are communicated officially to ALJs, the distinction between a "goal" and a "prediction" seems meaningless.

211. *See* D. COFER, *supra* note 6, at 93.

212. Bono v. United States Social Sec. Admin., Civ. No. 77-0819-CV-W-4 (W.D. Mo. 1979). The settlement agreement is reprinted in *ALJ Role*, *supra* note 97, at 448-50. For a discussion of the agreement, see D. COFER, *supra* note 6, at 111-14.

213. *See supra* note 210. This goal was challenged as a violation of the *Bono* settlement agreement in Association of Admin. Law Judges v. Heckler, 594 F. Supp. 1132 (D.D.C. 1984), but the judge dismissed that aspect of the case because it was being addressed by the Merit Systems Protection Board in pending disciplinary actions against some ALJs. *See* D. COFER, *supra* note 6, at 151-52.

214. *See ALJ Role*, *supra* note 97, at 73 (statement on behalf of the Association of Administrative Law Judges by Charles N. Bono, President, describing survey results); *id.* at 279-80 (statement of the position of the Federal Administrative Law Judges Conference).

215. These mechanisms included, among other things, restrictions on travel privileges, denial of staff, public praise for productive judges, and letters advising ALJs that they must increase productivity or decrease their allowance rates. *See ALJ Role*, *supra* note 97, at 72-73 (statement on behalf of the Association of Administrative Law Judges by Charles N. Bono, President).

216. Up until 1979, only one disciplinary action had been brought against an SSA ALJ or hearing officer, yet between 1979 and 1983, 16 such actions were brought. *See ALJ Role*, *supra* note 97, at 265-68.

217. *See* D. COFER, *supra* note 6, at 146-49; Rosenblum, *Contexts and Contents of*

such actions are brought against only a relatively few ALJs and are not particularly successful, such threats of disciplinary action may also compromise ALJ independence.[218]

c. Impact. These practices resulted in an atmosphere at SSA in which state DDSs and ALJs felt pressure to process claims quickly and deny benefits whenever possible. It is difficult to measure the precise impact this kind of pressure had on the number of cases in which benefits were denied, particularly since decisionmakers do not acknowledge that difficult factual determinations are influenced by external pressures (as opposed to explicit policies and regulations, which are expressly invoked to justify decisions). Nonetheless, it appears that such pressures have affected Social Security disability determinations in at least two ways. First, state DDSs and ALJs have shown a marked tendency to rely on medical advisors or consulting examiners rather than claimants' treating physicians in compiling and evaluating the medical record. Second, there is a lingering climate of tension and hostility at SSA.

In many cases coming before the federal courts, SSA denied benefits despite overwhelming contrary evidence in the record.[219] These results were often reached because decisionmakers relied on the opinions of medical advisors[220] or consulting examiners.[221]

"For Good Cause" as Criterion for Removal of Administrative Law Judges: Legal and Policy Factors, 6 W. NEW ENG. L. REV. 593, 621-32 (1984).

218. *See Appeals Council Report*, *supra* note 3, at 669 n.125.

219. *See, e.g.*, Burnette v. Bowen, 702 F. Supp. 47, 48 (E.D.N.Y. 1988) ("Case after case appearing before the court reveals a determined predisposition on the part of the Secretary and his agents to decide that claimants are not disabled without any substantial evidence to support the decisions."); Hawkins v. Heckler, 608 F. Supp. 1201, 1203-05 (D. Kan. 1985) (criticizing SSA); McLean v. Heckler, 586 F. Supp. 1364, 1365 (E.D. Pa. 1984) ("The evidence shows overwhelmingly that the claimant is totally disabled and for the ALJ to hold otherwise is an indulgence in the most blatant hypocrisy."). The procedural history in *Burnette* is instructive. In that case, the ALJ initially found the claimant not disabled. That decision was remanded under court order by agreement of the parties. On remand the ALJ found the claimant disabled. That determination was remanded by the Appeals Council. The ALJ then reversed himself, only to have his decision overturned by the district court. In all, the process took well over five years from the date of initial application. *See Burnette*, 702 F. Supp. at 48-49.

220. Medical advisors are part of the state DDS team that evaluates a claimant's disability; they do not examine the claimant. *See supra* note 33 and accompanying text.

221. In order to meet the time constraints generated by extensive CDRs, the use of consulting examiners (CEs) became more prevalent since it took less time to order CEs than to obtain original records from a treating physician. *See* CONSULTATIVE EXAMINATIONS INVESTIGATION, *supra* note 32, at 3. This practice produced a booming CE business which was often provided on a volume basis in a deceptive and fraudulent manner. *See id.* at 3-4, 10-15. *See also Human Costs (Pt. 3)*, *supra* note 127, at 198-204 (submission

In the process, state DDSs and ALJs failed to obtain, ignored, or discounted evidence from the claimant's treating physician.[222] Congress took action to ameliorate this problem in the Social Security Disability Benefits Reform Act of 1984 by requiring SSA to promulgate standards for the use of consulting examiners and to consider all available evidence regarding a claimant's case, including a complete medical history for at least the preceding twelve months if the claimant is determined not to be disabled.[223]

Although many of SSA's more controversial practices have been withdrawn or modified, their legacy of tension within the agency lives on, particularly between the Office of Hearings and Appeals (OHA) and ALJs. As one study put it, "if the skirmishes have now abated or been driven underground, a substantial reservoir of mutual suspicion and hostility lingers nonetheless."[224] Although the various, specific policy initiatives contributed greatly to the inter-agency tension, one must recognize that some tension is inherent in a system where supposedly independent adjudicators are housed within a bureaucratic structure.[225]

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of Paul Rosenthal, immediate Past President of the Assoc. of Admin. Law Judges, criticizing use of CEs).

222. *See* CONSULTATIVE EXAMINATIONS INVESTIGATION, *supra* note 32, at 3 (use of CEs instead of original medical records); *Burnette*, 702 F. Supp. at 49-50 (SSA relied on medical examiner's views); Jones v. Heckler, 583 F. Supp. 1250, 1256 (N.D. Ill. 1984) (same). Most courts have held that evidence from the claimant's treating physician must be given particular weight since he or she is most familiar with the claimant's condition. *See generally*, 2 H. MCCORMICK, *supra* note 6, § 677; *id.* § 677 (Supp. 1989) (collecting cases). Thus, decisions were often reversed if they relied on the opinions of medical examiners or CEs despite contrary evidence from the claimant's treating physicians, as in the *Burnette* and *Jones* cases.

223. Pub. L. No. 98-460, § 9, 98 Stat. 1794, 1804-05 (1984) (codified at 42 U.S.C. §§ 421(j), 423(d)(5)(B) (Supp. V 1987)). SSA is also directed to "make every reasonable effort to obtain from the individual's treating physician . . . all medical evidence . . . ." *Id.*

224. *Appeals Council Report*, *supra* note 3, at 686. The authors of that report add, "The various components of [the OHA] appear now to be on somewhat more harmonious terms than, for example, during the height of the CDR caseload explosion. In our interviews, however, we still found a substantial amount of latent mistrust." *Id.* at 686 n.170.

225. *See* D. COFER, *supra* note 6, at 197 ("[A]t the very least this study has demonstrated that management-minded bureaucrats and APA-admonished ALJs cannot live under the same roof and that the current situation is a disservice to the American people.").

4. Nonacquiescence

When SSA disagreed with a lower federal court decision, it followed a policy of nonacquiescence,[226] *i.e.*, SSA would comply with the decision only with respect to the party or parties to that case, but SSA would refuse to treat the decision as binding precedent even within the circuit in which the decision was handed down.[227] At times, other agencies have also followed a practice of nonacquiescence,[228] but SSA's policy took on particular importance given the disputed validity of various SSA disability determination practices. The SSA's nonacquiescence has been the subject of considerable commentary, most of it highly critical.[229]

The formality and frequency with which SSA practiced nonacquiescence is noteworthy. Nonacquiescence was official SSA policy, stated in express albeit general terms in the OHA Handbook.[230] In some instances, SSA issued separate nonacquiescence rulings in response to specific judicial decisions.[231] Other

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226. *See* Kubitschek, *supra* note 126; Stormer & Ferber, *supra* note 126; Comment, *The Doctrine of Nonacquiescence and the Secretary of Health and Human Services—A Challenge to Judicial Review*, 13 SAN FERN. V.L. REV. 9 (1985); Comment, *Social Security Continuing Disability Reviews and the Practice of Nonacquiescence*, 16 CUMB. L. REV. 111 (1985); Note, *Government Nonacquiescence Case in Point: Social Security Litigation*, 2 TOURO L. REV. 197 (1986) [hereinafter Note, *Government Nonacquiescence*]; Note, *SSA in Crisis*, *supra* note 126. *See also* Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471 (1986) (discussing nonacquiescence generally); Note, *Administrative Agency Intracircuit Nonacquiescence*, 85 COLUM. L. REV. 583 (1985) [hereinafter Note, *Intracircuit Nonacquiescence*]; Note, *Administrative Nonacquiescence in Judicial Decisions*, 53 GEO. WASH. L. REV. 147 (1984-1985) [hereinafter Note, *Administrative Nonacquiescence*]. *See generally Judicial Review of Agency Action: Health and Human Services Policy of Nonacquiescence: Oversight Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 99th Cong., 1st Sess. (1985) [hereinafter *Judicial Review of Agency Action*]. *But see* Kuhl, *The Social Security Administration's Nonacquiescence Policy*, 4 DET. C.L. REV. 913 (1984) (defending nonacquiescence).

227. This intracircuit nonacquiescence should be distinguished from intercircuit nonacquiescence, *i.e.*, the refusal to treat federal court of appeals decisions as legally binding outside of the circuit in which they were rendered. Intercircuit nonacquiescence receives less criticism. *See, e.g.*, Maranville, *supra* note 226, at 485.

228. In particular, the IRS and the NLRB have at times followed a policy of nonacquiescence. *See, e.g.*, Note, *Administrative Nonacquiescence*, *supra* note 226, at 147; Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 587-89.

229. *See* sources cited *supra* note 226.

230. § 1-161 (1975), *quoted in* Stieberger v. Heckler, 615 F. Supp. 1315, 1351 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986).

231. *See, e.g.*, Maranville, *supra* note 226, at 477 n.15 (listing 10 nonacquiescence rulings by SSA).

times SSA would simply ignore decisions with which it disagreed.[232] During the early to mid-1980s, SSA refused to comply with judicial decisions rejecting most of its restrictive policies regarding disability determinations. Thus, SSA refused to acquiesce in federal court decisions imposing a medical improvement standard in CDR cases,[233] invalidating medical vocational guidelines,[234] requiring SSA to consider the combined effects of impairments or subjective statements of pain,[235] and directing SSA to give special weight to the opinion of a claimant's treating physician.[236]

The SSA justified nonacquiescence principally on the basis of uniformity. Emphasizing that Congress had delegated authority to implement Social Security programs to it rather than to the federal courts, SSA insisted that the policy was necessary to ensure uniform national standards for disability determinations.[237] The SSA argued that nonacquiescence served as an appropriate mechanism for seeking a change in the law.[238] But despite its insistence to the contrary, SSA need not "nonacquiesce" to decisions to achieve uniformity. If it disagrees with a lower court decision, SSA can seek Supreme Court review.[239] Furthermore, rather than achieving uniform standards,

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232. *See, e.g.*, S. MEZEY, *supra* note 6, at 131; Maranville, *supra* note 226, at 481-82.

233. *See, e.g.*, Soc. Sec. Rul. 82-10c (disagreeing with Finnegan v. Matthews, 641 F.2d 1340 (9th Cir. 1982)); Soc. Sec. Rul. 82-49c (disagreeing with Patti v. Schweiker, 669 F.2d 582 (9th Cir. 1982)). This issue was probably the most significant battleground on which the nonacquiescence war was fought. *See generally* Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 585-87; *supra* notes 135-38 and accompanying text.

234. *See* Soc. Sec. Rul. 82-33c (disagreeing with Campbell v. Secretary of Health and Human Serv., 665 F.2d 48 (2d Cir. 1981), *rev'd sub nom.* Heckler v. Campbell, 461 U.S. 458 (1983)).

235. *See e.g.*, McDonald v. Secretary of Health and Human Serv., 795 F.2d 1118 (1st Cir. 1986) (multiple impairments); Nelson v. Heckler, 712 F.2d 346, 348 (8th Cir. 1983) (evaluation of pain).

236. *See, e.g.*, Stieberger v. Heckler, 615 F. Supp. 1315 (S.D.N.Y. 1985), *vacated*, 801 F.2d 29 (2d Cir. 1986) (class action challenging nonacquiescence in general, and specifically SSA's refusal to comply with a Second Circuit rule that an opinion of claimant's treating physician is ordinarily entitled to greater weight than other medical opinions).

237. *See, e.g.*, D. COFER, *supra* note 6, at 193; *Judicial Review of Agency Action*, *supra* note 226, at 6-10 (statement of Martha A. McSteen, Acting Commissioner of SSA); *id.* at 12-13 (statement of Carolyn B. Kuhl, Deputy Assistant Attorney General, Civil Division, Department of Justice). *See also* Maranville, *supra* note 226, at 493-94 (nonacquiescence avoids administrative burden of tracking diverse judicial precedent).

238. *See, e.g.*, Kuhl, *supra* note 226, at 913; Note, *Government Nonacquiescence*, *supra* note 226, at 209.

239. There is, of course, no guarantee that the Court will agree to hear every appeal by SSA, but in recent years the Court has been willing to resolve important Social Security issues that were brought before it. *See, e.g.*, Sullivan v. Everhart, 58 U.S.L.W. 4215

SSA's policy effectively created two different sets of standards: state DDSs and the Appeals Council followed a more restrictive set of standards supported by SSA, while ALJs and reviewing courts generally followed a less restrictive set of standards developed by the courts.[240] These conflicting standards placed considerable pressure on ALJs[241] and effectively divided claimants into two classes who received different treatment depending on their persistence in seeking review.[242]

The SSA also contended that as a coordinate, nonjudicial branch of government it was not bound by *stare decisis* to follow lower federal court decisions.[243] The SSA further claimed its nonacquiescence was permissible under the rule that the government is not bound by nonmutual offensive collateral estoppel.[244] These arguments are unconvincing. In a nation committed to separation of powers and the rule of law, legal rules announced in judicial decisions of the federal courts at all levels are binding on the executive branch unless those decisions are appealed.[245]

(U.S. Feb. 21, 1990) (No. 88-1323); Sullivan v. Zebley, 58 U.S.L.W. 4178 (U.S. Feb. 20, 1990) (No. 88-1377); Schweiker v. Chilicky, 108 S. Ct. 2460 (1988); Bowen v. Yuckert, 482 U.S. 137 (1987); Bowen v. City of New York, 476 U.S. 467 (1986); Heckler v. Day, 467 U.S. 104 (1984); Heckler v. Campbell, 461 U.S. 458 (1983).

240. *See supra* notes 185-86 and accompanying text. *See also Judicial Review of Agency Action*, *supra* note 226, at 132-33 (statement by Professor Brilmayer that nonacquiescence does not achieve uniformity because judicial standards apply to claimants who seek judicial review).

241. *See, e.g.*, *Judicial Review of Agency Action*, *supra* note 226, at 132-33 (statement of Professor Brilmayer); D. COFER, *supra* note 6, at 194; S. MEZEY, *supra* note 6, at 133. If ALJs followed the SSA standards, they were likely to be overruled by a federal court. If, as most did, they followed the judicial standards, the Appeals Council was likely to reverse. This latter alternative might adversely affect an ALJ under the targeted Bellmon Review program. *See supra* note 200 and accompanying text.

242. *See, e.g.*, S. MEZEY, *supra* note 6, at 132; Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 603.

243. *See, e.g.*, Note, *Government Nonacquiescence*, *supra* note 226, at 208-09. *See also* Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 592-94 (discussing nonacquiescence and the overruling power). *Cf.* Maranville, *supra* note 226, at 499-509 (discussing *stare decisis* and concluding that the doctrine is of little assistance in analyzing nonacquiescence).

244. *See* United States v. Mendoza, 464 U.S. 154 (1984). Under this argument, just as a judicial decision does not bind the government on factual issues that are relitigated in a subsequent case involving different parties, neither does it preclude the government from relitigating legal issues. *See, e.g.*, Note *Intracircuit Nonacquiescence*, *supra* note 226, at 591 & nn.65-66. This analogy, however, ignores important differences between factual preclusion and *stare decisis*. *See, e.g.*, *id.* at 591-92; Note, *Government Nonacquiescence*, *supra* note 226, at 200-07.

245. *See, e.g.*, *Judicial Review of Agency Action*, *supra* note 226, at 130-32 (statement by Professor Brilmayer that SSA's arguments are disturbingly broad in their implications for the rule of law); Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 595-

To some observers, it appeared that SSA simply chose to engage in a war of attrition against claimants rather than risk an adverse decision by the Supreme Court.[246]

Faced with a consensus of commentators opposing the policy,[247] adverse judicial decisions,[248] and the threat of congressional action,[249] SSA eventually modified its policy of nonacquiescence.[250] Nonetheless, this policy left its mark by contributing to the federal court caseload crisis in two important ways. First, the policy forced many cases into court that could have been resolved at the administrative level.[251] Second, the policy weakened public and judicial confidence in the fairness and accuracy of SSA disability determinations. Even where denials were appropriate, claimants were encouraged to believe that decisions were unfair and that appeals were justified.[252] Likewise, federal courts were less likely to accept SSA's positions at face value

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602. *See also* Maranville, *supra* note 226, at 499-528 (while various constitutional doctrines appear contrary to nonacquiescence, they fail to suggest limits to the practice).

246. *See, e.g., Judicial Review of Agency Action*, *supra* note 226, at 107 (comment by Rep. Frank).

247. *See* authorities cited *supra* note 226.

248. While the legality of nonacquiescence was never definitively resolved by the courts, lower courts that did consider the issue generally ruled intracircuit nonacquiescence to be illegal. *See, e.g.*, Note, *Intracircuit Nonacquiescence*, *supra* note 226, at 586-87 & n.32 (collecting cases).

249. The 1984 legislation initially contained a provision requiring SSA to comply with judicial decisions, but that provision was withdrawn when SSA indicated that it would abandon its nonacquiescence policy. *See* H.R. CONF. REP. No. 1039, *supra* note 165, at 36-38; 1984 U.S. CODE CONG. & ADMIN. NEWS 3094-96 (although the provision prohibiting nonacquiescence was withdrawn, conferees noted constitutional objections and urged that the nonacquiescence policy be followed only in limited situations). *See also* Note, *SSA in Crisis*, *supra* note 126, at 126 (discussing reasons for withdrawal of provision).

250. 10 SOC. SEC. L. REP. SERV. No. 3, Interim Circular 185, at 27 (OHA Handbook). This new policy does not require state DDSs to follow judicial precedent and provides for relitigation of judicial standards if the SSA Special Policy Review Committee determines that the case is "an appropriate vehicle for relitigating the issue." *Id.* at 30. Critics of the SSA contend that this "new" policy does not really limit nonacquiescence. *See, e.g., Judicial Review of Agency Action*, *supra* note 226, *passim*; S. MEZEY, *supra* note 6, at 165-66; Note, *Government Nonacquiescence*, *supra* note 226, at 215-17.

251. This is true whether or not the SSA standards or judicial standards were "correct" as a matter of statutory interpretation and regulatory policy. If the judicial standards were correct, then claimants were forced to appeal to federal court in order to have their claims adjudicated under proper standards. But even if the SSA standards were proper, the more lenient judicial standards encouraged dissatisfied claimants to seek judicial review. Thus, much litigation would have been avoided if lower courts were compelled to apply SSA standards because their validity had been definitively resolved by the Supreme Court.

252. *See, e.g.*, Kubitschek, *supra* note 126, at 75.

and were generally less deferential to the SSA.[253] This willingness to overturn SSA decisions in turn reinforced the tendency of dissatisfied claimants to seek judicial review.

C. Conclusions

The foregoing analysis of restrictive SSA policies coupled with historical and statistical background information have important implications for reform. First, because Social Security disability cases will undoubtedly remain a sizeable portion of the federal courts' docket, reform is both necessary and desirable to preserve judicial resources. Nevertheless, such reform should be approached with the recognition that the immediate crisis of the early 1980s is past. Second, the experience of the 1980s underscores the importance of ensuring fairness and accuracy in disability determinations. These interests must be protected under a reformed disability determination process. Finally, reform must be comprehensive in order to achieve substantial savings of judicial resources while ensuring fairness and accuracy in disability determinations.

1. Reform is desirable

Although the caseload crisis of the Social Security disability determination process may be past, the need for reform remains evident. Social Security appeals are far below the levels experienced in the early 1980s, but they still constitute a significant portion of the district courts' caseload and a somewhat lower yet burdensome portion of the courts of appeals' caseload.[254] Some future growth may be anticipated from at least two sources: the continually increasing number of new applications, and the re-

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253. This point is made forcefully by Professor Kubitschek. *See id.* at 75-76. Ostensibly, the same "substantial evidence" standard of review applies to SSA as to other agencies reviewed by federal courts. But the agency has long contended that federal courts do not accord its decisions appropriate deference. Assuming that SSA is correct on this point, the absence of judicial deference is at least in some measure SSA's own fault, because its positions over the years have led many courts to doubt that it is worthy of deference. *See id.* at 75 n.158 (collecting judicial opinions critical of the SSA).

254. There were 12,628 disability cases in the district courts in 1987, constituting 5.3% of their caseload, and 982 disability cases in the courts of appeals, constituting 3.2% of their caseload. *See supra* note 88. *See also* Jones v. Heckler, 583 F. Supp. 1250, 1252 (N.D. Ill. 1984) (describing the impact of Social Security cases on one district court judge's docket). *But see* Ogilvy, *supra* note 4, at 238-39 (disputing the significance of the burden on district courts as of 1982 considering the relative ease with which disability cases can be processed).

sumption of broad scale CDR.[255] It is doubtful, however, that these increases will parallel those experienced in the early 1980s. For example, despite the concern of some SSA critics over the resumption of CDR,[256] the rate of termination in current CDR cases is far below that experienced during the peak years of restrictive SSA practices.[257]

Even at current caseload levels, the substantial judicial resources allocated to disability determinations are not used in a cost-effective manner. In other words, under the current system, judicial review is not a particularly efficient mechanism for accomplishing either the instrumental or structural purposes it is thought to serve. Instrumentally, the added layers of judicial review might correct some of the random good faith errors that inevitably slip through the complex disability determination process. On the other hand, judicial review is illsuited to perform this corrective function.[258] Judges have no particular expertise concerning the technical medical and vocational judgments necessary to determine disability.[259] Even the legal questions involved in disability determinations are usually highly technical issues on which courts would normally defer to agency expertise.[260]

Structurally, judicial review provides an independent check on administrative decision-making that counters systemic biases. The importance of this function was underscored by the essential role judicial review played in the battle over SSA's restrictive policies. While independent review is essential,[261] the experience of the 1980s suggests the current system may not be the best institutional configuration to fulfill this role. First, judicial review is fragmented. There are twelve circuits (not counting the

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255. These increases can already be seen on the administrative level. *See* Table 2, *supra* text accompanying note 111. *See also Delays in Social Security and SSI Hearings Are Worst in a Decade*, 21 CLEARINGHOUSE REV. 539 (1987).

256. *See* S. MEZEY, *supra* note 6, at 168. Similar concern has been expressed regarding the continuation of SSA's nonacquiescence policy in modified form. *See supra* note 250.

257. In the 1988 fiscal year only 12% of the 318,134 CDRs conducted resulted in termination of benefits. BACKGROUND MATERIAL, *supra* note 111, at 51 (1988 figures). Forty-five percent of all terminations sought reconsideration; 45% of those which sought reconsideration were successful. *Id.* In contrast, in the 1982 fiscal year, 45% of the 401,182 CDRs conducted resulted in termination of benefits. *Id.* at 83 (1983 figures).

258. *See Appeals Council Report*, *supra* note 3, at 757.

259. *See, e.g.*, S. MEZEY, *supra* note 6, at 15.

260. *See, e.g.*, D. COFER, *supra* note 6, at 37-39.

261. *See infra* notes 378-81 and accompanying text.

federal circuit) and a myriad of district courts. Thus, many controversial issues must be relitigated in several jurisdictions resulting in unsettled law and possibly conflicting results. Second, judicial review is delayed. Given the recurring backlogs and delays in the administrative disability determination process, securing judicial relief from an erroneous benefit decision is a time consuming process at best, and many meritorious appeals may be lost to attrition. One comprehensive study of the judiciary's role in resolving the disability determination controversies of the early 1980s concluded that the courts were ultimately powerless to correct SSA abuses and that congressional intervention was necessary to resolve the crisis.[262]

2. *Reform must balance efficiency and fairness*

If the need for reform is clear, the experience of the early 1980s should make equally clear that independent review of SSA disability determinations is essential to ensure fair and accurate decisions. The threat of systemic bias is real, whether caused by the infusion of ideological and political agendas into the disability determination process[263] or by other factors that tend to influence decisions.[264] While the most immediate concern in the wake of the 1980s must be the danger of anti-claimant bias,[265] the reform must also safeguard against the emergence of a pro-claimant bias. Some observers have argued, for example, that there is an inherent tendency to favor the claimant in disability

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262. S. MEZEY, *supra* note 6, at 178-79.

263. Many critics of SSA during the Reagan years argued that SSA's restrictive policies were motivated by an ideology that was hostile to government benefit programs. *See Costly Constitutional Crisis*, *supra* note 119, at 1-3 (statement of Chairman Roybal); Lindh, *supra* note 124, at 757. *See also* B. WEBSTER & R. PERRY, *supra* note 6, at 25-36 (Reagan Administration policies reduced availability of benefits).

264. *See, e.g.*, J. MASHAW, *supra* note 6, at 73-74.

265. Despite easing of the restrictive policies of the 1980s, it is not entirely clear that these systemic biases have been eliminated. Some recent judicial decisions have criticized the fairness of SSA determinations. *See, e.g.*, Aviles v. Bowen, 715 F. Supp. 509, 516 (S.D.N.Y. 1989); Burnette v. Bowen, 702 F. Supp. 47, 48 (E.D.N.Y. 1988). In addition, some SSA policies used to deny benefits continue to be controversial, such as the Appeals Council's practice of reopening disability claims *sua sponte* after the running of the 60-day time limit for review. *See* Note, *Untangling "Operation Common Sense": Reopening and Review of Social Security Administration Disability Claims*, 87 MICH. L. REV. 1946 (1989). *See also* Sullivan v. Zebley, 58 U.S.L.W. 4178 (U.S. Feb. 20, 1990) (No. 88-1377) (reversing SSA's policy of denying benefits to disabled children whose impairments do not equal "listed" impairments). *See generally Current Problems*, supra note 10.

determinations.[266] Indeed, SSA defended many of its restrictive policies on the basis that they were intended to counteract this pro-claimant tendency.[267]

The social costs of inaccurate pro-claimant decisions may be far less than inaccurate decisions denying or terminating benefits because, in marginal cases, claimants who are denied Social Security benefits are also unlikely to find work and therefore may end up receiving other forms of government assistance.[268] Nonetheless, pro-claimant bias could threaten the fiscal integrity of the disability system. Such concerns prompted Congress to provide for CDR in the Social Security Disability Amendments of 1980.[269]

Thus, if the role of the federal courts in reviewing disability determinations is to be substantially reduced to conserve scarce judicial resources, some independent review must be instituted in its place to guard against systemic bias; administrative review as currently structured is not sufficiently independent. Despite the theoretical independence of ALJs from SSA, their location within SSA bureaucratic hierarchy provides SSA with mechanisms of control that may compromise ALJ decisional independence.[270] Moreover, since ALJ decisions are subject to *sua sponte de novo* review by the Appeals Council,[271] the final layer of administrative review is conducted in a body that, while enjoying considerable autonomy, is not safeguarded by even minimal APA protections.[272] Thus, any restriction of the judicial role in reviewing disability determinations should be accompanied by a strengthening of independent administrative review.

3. *Reform must be comprehensive*

Implicit in the foregoing conclusions is the recognition that, to be effective, any reform must also be comprehensive. In addition to accommodating efficiency and fairness concerns, comprehensive reform is necessary in order to remedy two other problems that have contributed to the caseload crisis: the frag-

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266. *See* J. MASHAW, *supra* note 6, at 73-74; Lindh, *supra* note 124, at 759-62.

267. *See supra* note 201 and accompanying text.

268. *See Appeals Council Report*, *supra* note 3, at 761-67. *See also supra* note 128 (degree to which CDR terminations preserved resources unclear).

269. *See supra* note 124 and accompanying text.

270. *See supra* notes 195-218 and accompanying text.

271. *See supra* notes 72-76 and accompanying text.

272. *See Appeals Council Report*, *supra* note 3, at 692-94.

mentation of authority over disability standards, and the inadequacy of resources devoted to the disability determination process.

First, current institutional arrangements divide authority over disability policy between SSA, the ALJs, and the courts, thereby producing a confusing array of different disability standards. Administrative policies are promulgated in various forms and their relative binding effect is unclear.[273] Moreover, SSA and judicial standards were frequently at odds, placing ALJs in the untenable position of being subject to review by two entities that each applied different legal standards.[274] Finally, judicial standards themselves often differed from district to district and from circuit to circuit.[275] In addition to sowing confusion for claimants, ALJs, and SSA, such judicial inconsistency contributed to the courts' difficulty in responding to SSA's restrictive policies.[276] Thus, any reform should include the restructuring of institutional arrangements to centralize and rationalize the formulation of policy regarding disability standards.

Second, any reform should also address the overarching shortage of resources that pervades the administrative determination of disability at both the state and federal levels. The number of claims processed is vast.[277] Many of the problems that arose in the early 1980s were the product of administrative efforts to cope with the growth of its caseload following the addition of SSI cases to the process without the infusion of adequate additional resources.[278] Increasing resources at the early levels of the disability determination process would be cost effective because benefits would redound throughout the system, reducing

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273. The SSA promulgated policies through remands of Quality Assurance Reviews (QARs), POMS provisions, Social Security Rulings, and regulations. Both QARs and POMS provisions affected only state DDSs. *See supra* notes 182-94 and accompanying text. The binding effect of Social Security Rulings on ALJs was the subject of some dispute. *See supra* note 186.

274. *See supra* notes 240-41 and accompanying text.

275. Ogilvy argues, however, that this sort of inconsistency "can be viewed as evidence of the healthy functioning of an independent judiciary" and that the principal cause of inconsistency has been different standards employed by SSA and the courts. Ogilvy, *supra* note 4, at 236. *See also* Rains, *supra* note 4, at 22-25 (discounting uniformity problems at the federal court level).

276. Not only did the potential for inconsistent judicial decisions require that many issues be relitigated in various jurisdictions, but it also provided some support for SSA's claim that nonacquiescence was necessary to achieve uniform disability standards. *See supra* notes 237-42 and accompanying text.

277. *See supra* note 110 and accompanying text.

278. *See supra* notes 89-107 and accompanying text.

the ALJs' burden of case development[279] and increasing claimant satisfaction with adverse decisions.[280] Moreover, even if administrative review were to become more independent from SSA, caseload burdens would continue to produce the kind of bureaucratic pressures to increase productivity that have been a bone of contention between ALJs and SSA in the past.[281] Even article III courts have felt similar pressures to increase productivity since faced with the mounting concern over caseloads and backlog.[282]

III. Recommendations for Reform

Based on the conclusions discussed above, this report makes four specific recommendations for reforming the Social Security disability determination review process. These proposals include (1) limiting judicial review to the Court of Appeals for the Federal Circuit on questions of statutory or regulatory validity and interpretation; (2) reconfiguring the Court of Veterans Appeals into an article I Court of Disability Appeals and vesting it with final administrative review; (3) increasing the independence of ALJs by separating them from SSA; and (4) continuing current efforts to improve the procedures for initial determination and reconsideration by state DDSs. These recommendations should be viewed as interdependent parts of a systematic restructuring of the disability review process.

A. *Recommendation One*

Judicial review should be limited to the United States Court of Appeals for the Federal Circuit and should be available only for issues concerning the validity or interpretation of statutes or regulations. Review of factual determinations or applications of statutes or regulations to facts should be limited to appeals that present a constitutional question.

Recommendation One can be implemented by amending section 301 of the Veterans' Judicial Review Act[283] to include

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279. Such improvement would also limit the number of ALJ reversals that are the product of new evidence or a better developed record at the ALJ level.

280. *See infra* notes 413-14 and accompanying text. *But see State Procedures Report*, *supra* note 33, at 596-98 (early experiments with face-to-face hearings at the reconsideration stage did not show any significant reductions in the rate of claimant appeals).

281. *See supra* notes 210-14 and accompanying text.

282. *See, e.g.*, R. Posner, *supra* note 1, at 94-129.

283. Pub. L. No. 100-687, 102 Stat. 4105 (1988) (to be codified in scattered sections

disability determinations under the Social Security statutes in the jurisdiction of the Court of Appeals for the Federal Circuit (Federal Circuit). The discussion below considers the judicial resources saved by eliminating district court review, the benefits and costs of limiting fact-based review at the court of appeals level, the constitutionality of the proposed limitations, and the advantages and disadvantages of unifying judicial review of disability determinations in the Federal Circuit.

1. Eliminating district court review

The most obvious and compelling reason to limit review is the savings of judicial resources. At least ten to fifteen thousand disability appeals can be expected annually in the district courts, comprising over five percent of their caseload.[284] These figures might rise.[285] Eliminating district court review would ease district court dockets considerably.

In the context of comprehensive reform, saving judicial resources need not entail the sacrifice of accuracy or fairness. As noted above, judicial review at the district court level is an ineffective means of catching and correcting good faith errors in disability determinations.[286] Furthermore, district court review is not a particularly desirable structural safeguard against systemic bias.[287] This function can be better served by retaining some limited court of appeals review[288] and by restructuring administrative review to make it more independent.[289]

The district courts do perform the additional functions of screening and preparing cases for the courts of appeals.[290] Under the current system, without district courts to screen cases, disability cases could flood the courts of appeals.[291] Moreover, a

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of 38 U.S.C.). Because Recommendation Two, *infra*, would create an independent Court of Disability Appeals, SSA should be allowed to initiate appeals to the Court of Appeals of the Federal Circuit to ensure SSA's role in the formation of adjudicatory principles regarding disability. *See infra* notes 389-94 and accompanying text.

284. *See supra* note 254.

285. *See supra* notes 255-57 and accompanying text.

286. *See supra* notes 258-60 and accompanying text.

287. *See supra* notes 261-62 and accompanying text.

288. The scope of the court of appeals review is discussed *infra* notes 296-312 and accompanying text.

289. The form of the restructuring is discussed *infra* notes 368-409 and accompanying text.

290. *See supra* notes 82-87 and accompanying text.

291. For example, in 1987 district courts heard 12,628 disability cases, while courts of appeals heard 982. *See supra* note 88. Indeed, the total caseload for the courts of

court of appeals is ill-equipped to perform the record-development function that is often necessary to conduct review.[292] The comprehensive reform recommended in this study addresses these functions in four ways. First, limiting the availability of review at the circuit court level obviates some of the need for district courts to screen cases and develop records.[293] Second, increasing the independence of administrative review should make that process better able to fulfill the screening function.[294] Third, improving the early stages of the disability determination process would in the long run lead to better developed administrative records which are better suited for review at the court of appeals level. A final, dubious factor is geography, which could discourage appeals because many claimants would have to traverse considerable distance to obtain judicial review if review is vested exclusively in the federal circuit.[295]

2. *Limiting court of appeals review*

It is more difficult to assess what savings, if any, of judicial resources can be expected as a result of limiting fact-based review of disability cases by the Federal Circuit.[296] Social Security appeals represent a modest yet sizeable portion of the circuit courts' overall caseload,[297] and fact-based review constitutes the lion's share of their disability cases.[298] However, judicial re-

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appeals was only 30,798, *see id.*, to which the addition of another 12,000 or so cases would constitute an increase of about 40%.

292. *See supra* notes 85-87 and accompanying text.

293. *See infra* note 301 and accompanying text.

294. *See infra* notes 395-402 and accompanying text. The extent to which independent administrative review will screen out cases is difficult to predict. It will depend to some degree on the faith which claimants have in the objectivity of administrative decisions. Some claimants may place significant value on review by an article III court and would not be satisfied with administrative review in situations where an unfavorable district court decision would have ended the case. But even if claimants had complete faith in the objectivity of administrative review, the number of cases reaching the circuit court level might increase substantially because one step in the review process has been eliminated. Attrition would therefore be less of a factor in pursuing an appeal to the circuit court level.

295. *See infra* notes 363-66 and accompanying text. This factor may actually cut against the decision to vest review in the Federal Circuit. To the extent judicial review is necessary and desirable, one may question the fairness of allowing such geographic considerations to affect the availability of review. *See id.*

296. For a discussion of the reasons for vesting review exclusively in that court, see *infra* notes 354-62 and accompanying text.

297. *See supra* note 88.

298. *See, e.g., Appeals Council Report, supra* note 3, at 676; Currie & Goodman, supra note 82, at 26.

sources preserved by restricting fact-based review may be counterbalanced or even exceeded by the influx of cases that previously would have been screened out at the district court level. Nonetheless, the net savings from the elimination of district court review would be substantial, and the restriction of fact-based review by the Federal Circuit is necessary to prevent these savings from being swallowed up by a flood of disability cases at circuit court level.

Limiting fact-based review by the Federal Circuit is also desirable because it confines judicial review to those situations where it is most essential. As noted previously, judicial review does little to correct good faith factual errors,[299] and systemic bias may be corrected through independent administrative review.[300] Moreover, given the elimination of district court review, fact-based review by the Federal Circuit may be impractical since circuit courts lack the facilities to develop incomplete administrative records.[301] At the same time, limiting fact-based review preserves the jurisdiction of the federal courts with respect to legal questions, including the validity or interpretation of statutes or regulations and constitutional issues. Preserving jurisdiction over these legal questions is important since they are essential attributes of judicial power both from a policy and a constitutional perspective.[302]

Although this study recommends the elimination of fact-based review, some countervailing concerns warrant careful consideration and may demand the retention of some fact-based review. First, the advantages of eliminating fact-based review may prove to be exaggerated. It may not be possible to prevent all fact-based review cases from arriving at the Federal Circuit. The difference between factual and legal issues is notoriously difficult to identify,[303] and many factual arguments can be couched as

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299. *See supra* notes 258-60 and accompanying text.

300. *See infra* notes 378-81 and accompanying text.

301. *See supra* notes 85-87 and accompanying text. On the other hand, the scope of this problem may be limited by improvements in the administrative process. When an inadequate record is encountered, the case could be remanded for administrative development of the record, which is a common practice in administrative law cases. Indeed, it is not entirely clear that district court development of the record is an appropriate remedy when administrative records are inadequate. *See supra* note 87.

302. *See infra* notes 331-33 and accompanying text.

303. *Compare, e.g.*, NLRB v. Hearst Publications, Inc., 322 U.S. 111 (1944) (whether newsboys are "employees" is a mixed question of law and fact) *with* Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947) (whether foremen are "employees" is purely a question of law). *See generally* S. BREYER & R. STEWART, *supra* note 82, at 258-61; B. SCHWARTZ,

questions of law so as to invoke the jurisdiction of the Federal Circuit.[304] Allowing the Federal Circuit to review factual determinations in the course of resolving constitutional issues compounds the problem.[305] To the extent that disability benefits are regarded as entitlements, any termination of benefits might raise due process concerns requiring judicial review of factual determinations underlying the decision.[306]

Conversely, precluding fact-based review, if effective, may substantially curtail the Federal Circuit's ability to ensure compliance with the law. Fact-based review may be necessary to guard against systemic bias.[307] Decisionmakers can manipulate applicable legal standards by making appropriate factual findings. The potential for this sort of manipulation has long been recognized in the context of federal review of state court fact-finding.[308] This gives rise to a "Catch-22" situation: if preclusion of fact-based review is extensive, then judicial power is weakened; on the other hand, if broad exceptions allow some fact-based review in order to strengthen the hand of the Federal Circuit, then the remaining fact-based preclusion does little to aid judicial economy. Moreover, any uncertainty regarding the availability of fact-based review might generate considerable litigation, at least until specific rules governing common issues can be developed.[309]

Given these considerations, it may be prudent to retain fact-based review at the circuit court level in some form. One

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ADMINISTRATIVE LAW 647-61 (1984).

304. For example, cases involving the evaluation of pain demonstrate that disputes over whether substantial evidence supports a determination that a claimant is not disabled often involve disputes over the appropriate legal standards to be used in evaluating the evidence. *See supra* notes 170-79 and accompanying text. Likewise, it might be possible to invoke jurisdiction on the basis of an analogy to standards for directed verdict and judgment notwithstanding the verdict by arguing that, as a matter of law, the evidence on the record was insufficient to support a given finding.

305. The exception for review of factual determinations regarding constitutional issues, which is included in the Veteran's Judicial Review Act as well as in this recommendation, serves principally to ensure adequate judicial power with respect to constitutional issues and to avoid due process and separation of powers concerns that might otherwise arise under the "constitutional fact doctrine." *See infra* note 332 and accompanying text.

306. *See infra* notes 341-53 and accompanying text.

307. Administrative pressures appeared to produce distorted fact-finding during the peak years of SSA's restrictive policies. *See supra* notes 219-23 and accompanying text.

308. *See, e.g.*, England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416-17 (1964); Comment, *Federal Preemption, Removal Jurisdiction, and the Well-Pleaded Complaint Rule*, 51 U. CHI. L. REV. 634, 636 n.10 (1984).

309. Of course, this assumes that rules can be developed to resolve uncertainty.

possibility is to allow discretionary fact-based review by the Federal Circuit.[310] This approach provides the Federal Circuit with ample power to ensure proper application of legal standards. It might also encourage the development of a coherent body of law prescribing when fact-based review is appropriate, which seems preferable to allowing the basic principle of factual preclusion to become riddled with complicated exceptions. Nevertheless, an explicit provision for discretionary fact-based review could result in a flood of applications for Federal Circuit review, a situation not much better and perhaps worse than allowing fact-based review as a general matter.[311]

Despite these concerns, restricting Federal Circuit review to questions of law and to questions of law and fact raised in the context of constitutional issues remains preferable to the alternatives. The spectre of thousands of disability cases flooding the Federal Circuit demands that review be so limited. But if the restriction is to be effective, the administrative review of fact-based determinations must be reliable and independent,[312] otherwise claimant dissatisfaction and the perceived need to correct systemic bias may influence the Federal Circuit to avoid the limitations on fact-based review.

3. *Constitutional considerations*

The recommended limitations on judicial review raise constitutional issues under both the separation of powers and due process doctrines. The Supreme Court has implied that the preclusion of judicial review may be unconstitutional under some circumstances.[313] Recommendation One may withstand constitu-

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310. *See* Currie & Goodman, *supra* note 82, at 19-23, 25-27 (suggesting that discretionary federal court of appeals review of district court disability decisions might be desirable).

311. While processing requests for review should take less time and resources than actually reviewing a case, it would still be a substantial burden on the Federal Circuit and its staff. There would also be considerable duplication of effort in cases for which review was ultimately granted. *See* Currie & Goodman, *supra* note 82, at 20-21.

312. Thus, this recommendation should not be evaluated or considered for adoption in isolation from Recommendations Two and Three, *infra*, which strengthen the independence of administrative review.

313. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 373-74 (1974); Crowell v. Benson, 285 U.S. 22, 50 (1932); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 107-08 (1902). *See generally* Shapiro & Levy, *Heightened Scrutiny of the Fourth Branch: Separation of Powers and the Requirement of Adequate Reasons for Agency Decisions*, 1987 DUKE L.J. 387, 430-31 (arguing that separation of powers requires that judicial review be available whenever agencies exercise significant legislative or judicial

tional scrutiny since it only limits judicial review rather than precludes it. Moreover, the judiciary has long tolerated the analogous but more extreme statutory provision precluding review of disability determinations made under veterans' benefits laws.[314] The Supreme Court has not squarely addressed the constitutionality of those provisions, however,[315] and the issues raised by limiting judicial review of Social Security disability determinations require closer analysis in light of recent developments in separation of powers and due process doctrines.

a. Separation of powers. Whether or not administrative adjudications are constitutional under separation of powers principles is an issue that has recently produced considerable judicial[316] and scholarly activity.[317] The basic issue presented by Recommendation One is whether the proposed restriction of judicial review would render Recommendation Two's delegation of judicial authority to the article I Court of Disability Appeals[318] unconstitutional under article III of the Constitution. The Supreme Court's most recent discussion of article III limits on administrative adjudication appears in *Commodities Futures Trading Commission v. Schor*,[319] in which the Court upheld the delegation of jurisdiction to the Commodities Futures Trading

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power); Verkuil, *Congressional Limitations on Judicial Review of Rules*, 57 TUL. L. REV. 733, 746-53 (1983) (arguing that judicial review of rulemaking is required).

314. *See* 38 U.S.C. § 211(a) (1982). This provision has been amended to allow limited review in the Federal Circuit. *See* Veteran's Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4120 (1988) (to be codified at 38 U.S.C. § 4092).

315. *See, e.g.*, Johnson v. Robison, 415 U.S. 361, 366-67, 373-74 (1974) (narrowly construing the preclusion provision so as not to foreclose review of constitutional challenges to the statute). *See also* Note, *Congressional Preclusion of Judicial Review of Federal Benefit Disbursement: Reasserting Separation of Powers*, 97 HARV. L. REV. 778, 790-91 (1984) [hereinafter Note, *Congressional Preclusion*] (describing judicial resistance to and circumvention of preclusion provisions in federal benefit statutes).

316. *See* Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (plurality opinion).

317. *See, e.g.*, Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 916 (1988); Saphire & Solimine, *Shoring Up Article III: Legislative Court Doctrine in the Post* CFTC v. Schor *Era*, 68 B.U.L. REV. 85 (1988); Young, *Public Rights and the Federal Judicial Power: From* Murray's Lessee *Through* Crowell *to* Schor, 35 BUFFALO L. REV. 765 (1986).

318. *See generally* Note, *The Constitutionality of Chapter Nineteen of the United States-Canada Free-Trade Agreement: Article III and the Minimum Scope of Judicial Review*, 89 COLUM. L. REV. 897, 903-12 (1989) [hereinafter Note, *Free-Trade Agreement Constitutionality*] (discussing the constitutional implications of limiting the scope of article III court review).

319. 478 U.S. 833 (1986).

Commission (CFTC) over common law counterclaims filed in the course of administrative proceedings against brokers. The Court indicated that article III analysis requires evaluation of three factors:

> [1] the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, [2] the origins and importance of the right to be adjudicated, and [3] the concerns that drove Congress to depart from the requirements of Article III.[320]

Applying these factors to the recommended restriction on judicial review, a strong argument can be made that the recommendation is within constitutional limits.

(1) "The essential attributes of judicial power." To determine whether the essential attributes of judicial power had been retained in article III courts, the Supreme Court in *Schor* examined the scope of jurisdiction exercised by the CFTC, whether CFTC could enforce its own orders, and the scope of review exercised by article III courts.[321] Applying this analysis to the recommendations advanced in this study, the "essential attributes" factor of *Schor* may appear to weigh against the constitutionality of the recommendations. First, the Court of Disability Appeals' authority to adjudicate claims, like the CFTC's authority in *Schor*, "deals only with a 'particularized area of law,' "[322] but the sheer number of Social Security claims dwarfs the CFTC caseload.[323] Second, Social Security disability deter-

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320. *Id.* at 851.

321. *See id.* at 851-53. This factor, whether the essential attributes of judicial power remain with article III courts, would appear to be the most significant of the three factors identified in *Schor* both in terms of the attention devoted to it in *Schor* and in terms of the "core function" approach that the Court has recently employed in other separation of powers contexts. *See* Mistretta v. United States, 109 S. Ct. 647 (1989) (upholding the Sentencing Guidelines Commission); Morrison v. Olson, 487 U.S. 654 (1988) (upholding the independent counsel statute). Under this approach, the essential question in separation of powers cases is whether the limitations on the authority of a branch of government encroach upon its core functions. *See generally* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984).

322. *Schor*, 478 U.S. at 852 (quoting Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 85 (1982) (plurality opinion).

323. From July 1, 1987 to June 30, 1988, district courts handled a total of 2,638 cases under all the federal securities and commodities statutes, *see* 1989 DIRECTOR REPORT, *supra* note 88, at Table C2, while courts of appeals heard 443 cases. *Id.* at Table B-7. Judicial review of CFTC decisions were probably a small proportion of those cases

minations can be implemented without judicial action whereas CFTC orders are enforceable only by court order.[324] Finally, the scope of judicial review contemplated under Recommendation One is narrower than that provided in *Schor*. In *Schor*, the CFTC's factual determinations were reviewable under the "weight of the evidence" standard.[325] Under Recommendation One, the Court of Disability Appeals' legal determinations would be subject to *de novo* review by the Federal Circuit, but fact-based review would be limited to constitutional issues.

The limitation of fact-based review should not be dispositive, however. In *Thomas v. Union Carbide Agricultural Products Co.*,[326] the Supreme Court upheld a congressional delegation of judicial power to an arbitrator appointed by the Federal Mediation and Conciliation Service to resolve claims for compensation under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[327] Under the Act, judicial review of arbitrators' decisions is available only for "fraud, misrepresentation, or other misconduct."[328] This standard of review is more restrictive than the recommendation's proposal to limit review of the Court of Disability Appeals since the recommendation preserves review over questions of law and constitutional facts.[329]

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which would include, for example, private actions under the Securities Acts. *Schor* leaves unclear whether the number of cases handled is a significant factor in the analysis. In *Schor* itself, the Supreme Court seemed to focus on the range of legal matters that can be resolved by the CFTC rather than on the actual number of cases. *See* 478 U.S. at 852-53. On the other hand, one can argue that the number of people affected by the jurisdiction of a non-article III tribunal is relevant to the question of whether the delegation of judicial authority to that tribunal constitutes a significant encroachment on the power of article III courts.

324. *See* 478 U.S. at 853. Although the Supreme Court does not discuss why this factor should matter, its only apparent significance is that judicial enforcement requires the agency rather than the individual to seek review. Judicial review is therefore guaranteed before any adverse administrative action can be taken. In contrast, decisions denying or terminating disability benefits would escape judicial oversight in cases where the claimant does not seek review.

325. *See id.* at 853.

326. 473 U.S. 568 (1985).

327. 7 U.S.C. § 136a(c)(1)(D)(ii) (1988). As a precondition for registration, FIFRA requires pesticide manufacturers to furnish the EPA with research data on a pesticide's health, safety, and environmental effects. Such data may be used by the EPA in considering the subsequent registration of the same or similar pesticides, but only if the later registrant (called a "follow on" registrant) agrees to compensate the original data submitter. If there is a disagreement as to the amount of compensation, the parties must submit the dispute to binding arbitration. *See generally Thomas*, 473 U.S. at 572-73.

328. 7 U.S.C. § 136(a)(1)(D)(ii) (1988).

329. *See* Crowell v. Benson, 285 U.S. 22 (1932). This would also be an important concern under a core functions approach, *see supra* note 321, because review of legal

Despite recent cases emphasizing deference to an agency's interpretation of the statutes it administers,[330] the Supreme Court continues to recognize that judicial review of questions of law is essential to ensuring that agencies act within the scope of their statutory and constitutional authority.[331] Likewise, the "constitutional" or "jurisdictional" fact doctrine, which requires *de novo* judicial review of factual determinations that are necessary to the constitutional assertion of administrative authority,[332] retains some vitality.[333] Since the recommendation preserves judicial review over questions of law and constitutional issues, at least these "essential attributes of judicial power" would remain in the article III Court of Appeals for the Federal Circuit. Comparison to *Thomas* therefore suggests that this article's proposed restriction of judicial review does not, by itself, constitute an article III violation.

(2) The "nature of the right asserted" and congressional concerns. Although many of the "essential attributes of judicial power" are preserved in the article III courts under Recommendation One, this factor is generally less favorable to the constitutionality of the recommendation than it was on the facts in *Schor*. Nonetheless, the recommendation should be upheld because the remaining two factors discussed in *Schor* favor the recommendation. The right at issue, *i.e.*, the right to receive disability benefits, is a "public right."[334] When a public right is

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questions and constitutional issues arguably fall within the core functions of the judiciary.

330. *See, e.g.*, NLRB v. United Food and Commercial Workers Union, Local 23, 484 U.S. 412 (1987); INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc., 470 U.S. 116 (1985); Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).

331. *See* cases cited *supra* note 330.

332. *See generally*, *Crowell* 285 U.S. 22; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 624-53 (1965); B. SCHWARTZ, *supra* note 303, at 624-27; Glick, *Independent Judicial Review of Administrative Rate-Making: The Rise and Demise of the* Ben Avon *Doctrine*, 40 FORDHAM L. REV. 305 (1971); Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229 (1985); Strong, *Judicial Review: A Tri-Dimensional Concept of Administrative-Constitutional Law*, 69 W. VA. L. REV. 249 (1967); Note, *De Novo Judicial Review of Administrative Agency Factual Determinations Implicating Constitutional Rights*, 88 COLUM. L. REV. 1483 (1988) [hereinafter Note, *De Novo Judicial Review*].

333. *See generally* Monaghan, *supra* note 332; Note, *De Novo Judicial Review*, *supra* note 332.

334. While the Supreme Court has not precisely defined the contours of "public rights," *see* Granfinanciera, S.A. v. Nordberg, 109 S. Ct. 2782, 2796-97 (1989); Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587-89 (1985); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982) (plurality opinion), benefit programs are quintessential examples of rights that are public in nature. *See Crowell*, 285

involved, Congress may have absolute discretion to delegate its adjudication to a non-article III court; at any rate, this factor weighs heavily in favor of the constitutionality of Recommendation One.[335]

The remaining *Schor* factor—the concerns that would prompt Congress to vest adjudicative authority in the Court of Disability Appeals—is compelling: the recommended reforms seek to minimize the burden that Social Security disability cases impose upon an already over-burdened federal docket by restructuring the disability review process and reducing the number of cases subject to judicial review.[336] At the same time, these reforms strengthen the disability determination process by making administrative review more independent.[337] The reallocation of authority to review disability determinations is therefore essential to the congressional goal of ensuring a fair, accurate, and efficient system for resolving the myriad of disability claims that must be processed annually.[338]

U.S. at 51 (listing "payments to veterans" as an example of public rights whose adjudication could be vested exclusively in an administrative agency). By way of contrast, the Court in *Thomas* described the right at issue as "not a purely 'private' right, but bear[ing] many of the characteristics of a 'public' right." 473 U.S. at 589.

335. In its early decisions, the Court indicated that Congress could vest complete authority to adjudicate public rights in a non-article III tribunal. *See Crowell*, 285 U.S. at 50; Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 284 (1855). A plurality of the Court appeared to endorse that view in the *Marathon Pipe Line* case. 458 U.S. at 67-71. More recently, however, the Court has taken the position that whether a public or private right is involved is only one factor to be considered in assessing the constitutionality of a delegation of judicial power. *See Schor*, 478 U.S. at 853-54; *Thomas*, 473 U.S. at 589. *But see Granfinanciera*, 109 S. Ct. at 2796-97 (discussion implying that adjudication of public rights by non-article III courts is per se valid).

Even the more limited significance attached to the distinction can be challenged. After all, the Court has essentially rejected the significance of the distinction for due process purposes. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261-66 (1970). If public rights are of equal importance to private rights in the due process context, it is difficult to see why the delegation of judicial authority over public rights should be regarded as a less threatening encroachment on the judicial power than a similar delegation of authority over private rights. *Cf.* Note, *Congressional Preclusion*, *supra* note 315, at 782 n.32 (suggesting that the use of the public/private right distinction in *Marathon Pipe Line* implies that the right/privilege distinction is relevant for due process analysis of preclusion of judicial review under benefits statutes).

336. *See supra* notes 289-91 and accompanying text.

337. *See infra* notes 378-81 and accompanying text.

338. *Cf.* Commodities Futures Trading Comm'n v. Schor, 478 U.S. 833, 854-56 (1986) (CFTC jurisdiction over counterclaims was an integral part of Congress' intent to establish an inexpensive and expeditious forum for enforcing the Commodities Exchange Act). On the other hand, the Court in *Schor* did emphasize that judicial power had not been precluded, but rather that CFTC jurisdiction was an alternative to judicial jurisdiction that was selected at the option of the parties. *See id.*

In summary, although the question is not entirely free from doubt, Recommendation One should survive separation of powers scrutiny according to *Schor*. This recommendation proposes a reduction of judicial authority, but only with respect to a particularized field of law. Judicial review is retained for legal questions and constitutional issues thereby reserving core judicial functions for an article III court. Moreover, a public right is being adjudicated, a factor which weighs in favor of upholding the limitations on judicial review under current analysis. Finally, Congress has legitimate and compelling reasons to support its decision to curtail review.

b. Due process. The due process implications of limiting review must be analyzed according to two lines of cases. In the first line of cases, the Supreme Court has construed preclusion statutes narrowly to allow judicial review of constitutional claims, implying that a statute precluding judicial review of constitutional claims would be unconstitutional.[339] A similar rationale can support the constitutional fact doctrine, which has due process as well as separation of powers underpinnings.[340] Since Recommendation One preserves full judicial authority to resolve constitutional issues as well as questions of law, this line of cases presents no obstacle to the proposed limitation on review.

Under the second line of cases, the issue is whether claimants have been deprived of a property right without being afforded due process.[341] It has long been accepted that judicial review may be one of the procedural safeguards required for due

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339. *See, e.g.*, Webster v. Doe, 108 S. Ct. 2047, 2053-54 (1988); Johnson v. Robison, 415 U.S. 361, 366-67 (1974); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94, 101-03 (1902). This kind of due process argument is analogous to the separation of powers issues raised by congressional removal of certain kinds of constitutional claims from the jurisdiction of federal courts. *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871). *See generally* Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Ratner, *Congressional Power over the Appellate Jurisdiction of the Supreme Court*, 109 U. PA. L. REV. 157 (1960); Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001 (1965). Indeed, *Robison* has been analyzed as a separation of powers case. *See* Note, *Free-Trade Agreement Constitutionality*, *supra* note 318, at 910-11.

340. *See, e.g.*, L. JAFFE, *supra* note 332, at 639. Although *Crowell* emphasized separation of powers arguments, the Court also relied on due process. *See* Crowell v. Benson, 285 U.S. 22, 45-48 (1932).

341. *See* Mathews v. Eldridge, 424 U.S. 319, 332-33 (1976). *See also* Goldberg v. Kelly, 397 U.S. 254, 261-63 (1970). Under these cases, Social Security disability benefits would constitute statutory entitlement to which the procedural protections guaranteed by due process apply. *See Mathews*, 424 U.S. at 332.

process.[342] Thus, whether Recommendation One's limited judicial review satisfies procedural due process requirements must be determined by applying the *Mathews v. Eldridge* three-part balancing test.[343] Under the test, the importance of the private interest affected by government action and the risk of erroneous deprivation under the procedures involved are balanced against the burden on the government which additional procedures would entail.[344]

The *Mathews* test presents little danger to Recommendation One's restriction on judicial review. In *Mathews* itself the Court upheld the procedures for terminating Social Security disability benefits even though a pretermination hearing was not guaranteed.[345] *Mathews* indicated that while Social Security disability benefits are an important right, they are less important than, for example, welfare benefits.[346] In addition, *Mathews* regarded the risk of erroneous deprivation of disability benefits to be slight because the expert evaluation of medical evidence was involved.[347] Finally, *Mathews* emphasized that added procedures for a myriad of disability claims would be a substantial burden on the government.[348]

Mathews represents persuasive support for the constitutionality of Recommendation One's limitation of judicial review. In *Mathews*, the Supreme Court did note that judicial review of factual findings was available under the substantial evidence standard;[349] thus, judicial review is a factor in due process cases. But the most important areas of judicial review are preserved in Recommendation One[350] and the neutrality of administrative review will be enhanced by creating an article I Court of Disability

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342. *See* Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1294-95 (1975).

343. 424 U.S. 319, 335 (1976).

344. *Id.*

345. *See id.* at 339-40.

346. The Court reasoned that Social Security disability claimants may have other sources of income, including other government benefit programs. *Id.* at 340-41.

347. *Id.* at 344.

348. *Id.* at 347-48.

349. *Id.* at 339 & n.21.

350. For this reason, Recommendation One differs from the almost complete preclusion of judicial review that has long applied to disability determinations under the veterans statutes and that has been criticized as unconstitutional under the *Mathews* test. *See* Note, *Congressional Preclusion*, *supra* note 315, at 788-89; Note, *One Last Battle: Reform of the Veterans' Administration Claims Procedure*, 74 VA. L. REV. 937, 962-64 (1988).

Appeals and improving the independence of ALJs.[351] Admittedly, the Court's application of the balancing test in *Mathews* can be criticized, especially in light of the experience of the 1980s which demonstrated both the importance of disability benefits to recipients and the risk of erroneous deprivation.[352] On balance, however, the recommended procedures for reviewing disability claims provide more rather than less protection for claimants by strengthening the independence of administrative review.[353]

4. *The Federal Circuit*

Recommendation One vests exclusive judicial power to review disability determinations in the Federal Circuit. This scheme is part of an overarching effort to unify the hierarchy for disability determinations. Under the current system, judicial authority is dispersed among circuit and district courts while administrative review is divided between independent ALJs and a not fully independent Appeals Council.[354] Recommendations One and Two replace that system with a single federal circuit court of appeals and a federally structured administrative review system headed by an article I court.[355] This structure will help prevent the fragmentation of disability standards which confused the system in the 1980s.[356]

The use of the Federal Circuit is also part of a comprehensive plan to combine disability appeals under the Social Security system and veterans' statutes into one unified system. This com-

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351. *See infra* Recommendations Two and Three.

352. *See, e.g.*, Davis, *Comment: The Social Security Decisions of Judge Frank Easterbrook, Seventh Circuit Court of Appeals*, 40 ADMIN. L. REV. 239, 248-50 (1988); Kubitschek, *supra* note 126, at 53.

353. By creating an independent article I Court of Disability Appeals (Recommendation Two) and increasing the independence of ALJs (Recommendation Three), this sort of independent review should satisfy due process requirements. For example, Davis argues that "independent" review is necessary to preserve due process, but does not specify that it must be article III review. Davis, *supra* note 352, at 250. Moreover, statutory provisions for continuation of benefits pending administrative review mean that claimants seeking review will always receive a pretermination hearing. *See supra* note 146 and accompanying text.

354. *See supra* notes 271-72 and accompanying text.

355. Under Recommendation Two, the Court of Disability Appeals would sit in geographically distributed panels, reviewing ALJ decisions from within an assigned region. The court would be equipped with an *en banc* mechanism to ensure uniformity between panels. *See infra* notes 376-77 and accompanying text.

356. *See supra* notes 273-76 and accompanying text.

bination makes perfect sense given the overlapping medical and vocational expertise necessary to make both types of disability determinations.[357] Since the Federal Circuit has already assumed the judicial review function for veterans' disability determinations and a statutory model is already in place,[358] it is only logical to engraft the proposed Social Security reforms into this preexisting structure. In addition to unifying standards, vesting judicial review in a single court of appeals should enable the court to develop its expertise, improving its ability to review disability determinations.[359]

Nonetheless, there may be some problems with using the Court of Appeals for the Federal Circuit. First, the Federal Circuit currently has little or no experience with disability claims.[360] Second, it is not clear that the judges of the court have any desire to become disability experts, particularly since the court's jurisdiction generally involves other types of issues.[361] Finally, while the restriction of factual review and improvements in administrative adjudication are expected to reduce the number of disability cases in which judicial review is sought, the volume of disability cases reaching the Federal Circuit could nevertheless be very large, perhaps making the caseload

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357. For example, Veteran's Administration disability determinations may be evidence of disability under the Social Security laws, but they are not binding because different legal standards govern. *See* 2 H. McCormick, *supra* note 6, § 640, at 678.

358. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (to be codified in scattered sections of 38 U.S.C.).

359. It has been argued that one disadvantage of specialization is that "expert" reviewing judges are more likely to substitute their judgment for that of the initial decisionmaker. *See* Ogilvy, *supra* note 4, at 245. *See also infra* note 387 (discussing the need for specialization in disability reviews). Despite this concern, it seems that specialization and the resulting expertise are advantages rather than disadvantages. Many countries have specialized judiciaries for adjudicating public benefits claims; the proposed reforms could be a first step in moving towards such a model. *See* Skoler & Weixel, *Social Security Adjudication in Five Nations: Some International Perspectives and Comparisons*, 33 Admin. L. Rev. 269 (1981).

360. The Federal Circuit does not currently hear Social Security claims. Instead, such claims are appealed to the district court for the district in which the claimant resides (or to the District Court for the District of Columbia); from the district court the claims are appealed as ordinary civil actions. *See* 42 U.S.C. § 405(g) (1982). The Federal Circuit has not yet amassed experience with disability claims under the Veterans' Judicial Review Act although the effective date for adding veterans' disability cases to the court's docket was September 1, 1989. *See* Pub. L. No. 100-687, § 401(a), 102 Stat. 4105, 4122 (1988) (to be codified at 38 U.S.C. § 4051(a)).

361. The court's current jurisdiction includes trade, government contracts, patents, compensation claims against the government, and civil service disputes. *See* 28 U.S.C. §§ 1292(c)-(d), 1295 (1982). *See generally* Sward & Page, *The Federal Courts Improvement Act: A Practitioner's Perspective*, 33 Am. U.L. Rev. 385, 389-400 (1984).

unmanageable.[362] At the very least, it appears that a number of new judges should be added to the Federal Circuit to handle the influx of new cases.

Another potential problem with Recommendation One is that geographical barriers may prevent claimants from seeking review. Assuming the Federal Circuit would continue to sit in one location,[363] many claimants would be forced to travel long distances to obtain judicial review. This prospect must appear particularly daunting considering that claimants have already pressed their claims through two levels of administrative review and may lack sufficient resources to pursue the litigation.[364] Nevertheless, these possible geographical problems may be less severe in actuality since administrative review will become more independent and fact-based review will be restricted at the Federal Circuit level. Moreover, the problems could be alleviated by having the Federal Circuit hear disability appeals in various locations throughout the country.[365] Allowing attorneys' fees for successful claimants would further reduce the hurdles for claimants while ameliorating the hardship of litigation and encouraging attorneys to represent disability claimants.[366]

Given the force of all these concerns, however, two other approaches to federal circuit court review might be considered as alternatives to Recommendation One. First, the current system of twelve separate circuits could be retained. This would avoid caseload difficulties and minimize geographic barriers to review,[367] but it would also sacrifice the advantages of uniformity and expertise. Second, a specialized article III Circuit Court for

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362. *See* Rains, *supra* note 4, at 29-30.

363. *Id.* at 30.

364. Since it is recommended that SSA be allowed to appeal adverse decisions by the Court of Disability Appeals, *see supra* note 283 and accompanying text, claimants could be forced to defend their claims at great expense.

365. *See* Rains, *supra* note 4, at 30 ("Absent provision for the Federal Circuit judges to 'ride the circuits,' claimants will be placed at an extreme disadvantage in arguing appeals.").

366. Currently, claimants may recover fees from the government under the Equal Access to Justice Act (EAJA), which generally limits fee awards to cases in which the government has been unreasonable. *See generally* Cromwell, *A Substantial Paradox: Attorney's Fees Under the Equal Access to Justice Act in Social Security Appeals*, 7 U. ARK. LITTLE ROCK L.J. 355 (1984). While fees were often awarded during the height of SSA's restrictive policies, many successful claimants were not entitled to EAJA fees and had attorneys' fees deducted from the benefits they recovered. *See supra* note 58.

367. Even if court of appeals review were available in every circuit, some geographic barriers to judicial review would remain because of the elimination of district court review. *See* Currie & Goodman, *supra* note 82, at 7-8.

Disability Appeals could be created. Such a court would preserve the benefits of unification and specialization while avoiding the added burden on the Federal Circuit. These alternatives should be considered if it appears the number of disability cases reaching the court of appeals level will be large despite the recommended improvements in administrative review and the restrictions on fact-based review.

B. Recommendation Two

An article I Court of Disability Appeals with jurisdiction to review ALJ disability determinations should be created by expanding the size and jurisdiction of the Court of Veterans Appeals. The Appeals Council should coordinate regulatory policy with litigation strategy and disability case law.

Recommendation Two can be implemented by amending section 301 of the Veterans' Judicial Review Act.[368] Many of section 301's provisions would require little or no change to accommodate the recommendations. The discussion below describes the proposed article I Court of Disability Appeals, considers the need for an independent article I tribunal, and suggests an effective alternative use for the Appeals Council.

1. The Court of Disability Appeals

Recommendation Two envisions a Court of Disability Appeals that would be significantly larger than either the current Appeals Council or the Court of Veterans Appeals.[369] Because judicial review has been limited, this final level of administrative review takes on added significance. The court should sit collegially in panels of three, and some form of oral argument is essential.[370] Although the scope of review should be limited and pres-

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368. *See supra* note 283 and accompanying text. A proposal for a specialized article I disability court is not new. *See* authorities cited *supra* note 4. *See also* SUBCOMM. ON SOCIAL SECURITY, HOUSE WAYS AND MEANS COMM., ADMINISTRATIVE LAW JUDGES SURVEY AND ISSUE PAPER 11-12 (1979) (proposing a specialized court) [hereinafter ALJs SURVEY AND ISSUE PAPER]; *Current Problems*, *supra* note 10, at 2-3 (statement of Rep. Archer describing H.R. 4419's proposal for a specialized court); *Pending Problems*, *supra* note 103, 13-14 (describing H.R. 3865's proposal for a specialized court). Recommendation Two does not necessarily correspond to prior proposals in its particulars.

369. The Appeals Council consists of 20 members, *see supra* note 59, and the Court of Veterans Appeals consists of between three and seven members. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4114 (1988) (to be codified at 38 U.S.C. § 4053(a)).

370. Although the Appeals Council normally conducts purely paper reviews, current

entation of new evidence should not be permitted,[371] the claimant should appear and be represented by counsel. Since the Court of Disability Appeals will be independent of SSA,[372] the agency should be allowed to initiate review by the Court of Disability Appeals and appear in opposition to the claimant.[373] This sort of proceeding appears to be what Congress contemplated for the Court of Veterans Appeals,[374] and it makes sense to work with that court in setting up the proposed Court of Disability Appeals.

The procedures contemplated under Recommendation Two are not elaborate, but they are more involved than those currently in use before the Appeals Council.[375] The expansion of procedures will necessitate the expansion of the Court of Disability Appeals beyond the present size of the Appeals Council. It will also be necessary to distribute the panels geographically in order to hear appeals from ALJ decisions within various regions.[376] The geographic distribution is especially important since the availability of article III judicial review will probably be limited geographically as well as substantively.[377] The geographic division of the Court of Disability Appeals may result in inconsistencies between regions, but such inconsistencies can be resolved through an *en banc* mechanism or by court of appeals review.

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regulations allow oral argument as an exception. *See supra* note 66.

371. Failure to "close" the administrative record contributes to the unevenness of administrative review. *See* Bellmon Report, *supra* note 199, at 18-19.

372. *See infra* notes 378-81 and accompanying text.

373. Allowing SSA to oppose the claimant would necessarily compromise the nonadversarial tone of disability determinations. *See infra* note 404 and accompanying text. Some have recommended experimenting with more adversarial procedures, *see, e.g.*, D. COFER, *supra* note 6, at 196, and SSA itself has moved toward a more adversarial process. Its controversial representation experiments provide an excellent example of this trend. *See supra* note 55. Substantively, it appeared in the early 1980s that SSA had adopted an adversarial posture.

374. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4115-18 (1988) (to be codified at 38 U.S.C. §§ 4061-69). Indeed many of the Court of Veterans Appeals provisions, such as the one governing the scope of review, would require little if any change to implement the proposed Court of Disability Appeals.

375. *See supra* notes 66-70 and accompanying text. Current estimates declare that the Council spends less than fifteen minutes per member per decision reviewed. *See Recommendation 87-7: A New Role for the Social Security Appeals Council*, 1987 ACUS 36, 37 [hereinafter *New Role for Appeals Council*].

376. Judicial districts or circuits may be used to define particular regions.

377. *See supra* notes 363-66 and accompanying text.

2. An article I court

The most important reason for vesting the review function of the Appeals Council in an article I Court of Disability Appeals is to ensure the independence of the administrative review process.[378] The experience of the early 1980s underscores the need for independent review.[379] With Recommendation One's limitation of article III judicial review, independent administrative review becomes imperative not only to ensure fairness for individual claimants but also to make limited judicial review workable. If claimants or the Federal Circuit lack confidence in administrative review, then more claims are likely to be appealed thereby creating pressure on the article III Federal Circuit to find ways to make review more available.[380] Moreover, independent administrative review is necessary to preserve the benefits of independent ALJs.[381]

Given the force of these considerations, one might argue that the Court of Disability Appeals should have article III status. Prior legislative proposals for the creation of a Social Security court have been criticized on precisely this ground—why not an article III court?[382] Undoubtedly article III status would enhance the stature and independence of the Court of Disability Appeals and obviate constitutional concerns regarding the restricted review by the Federal Circuit.[383] Nevertheless, this study deems an article I court to be more desirable. Staffing an article III court would require the creation of many article III judgeships, thereby detracting from the prestige of the office which in this era of low judicial salaries is one of its most important attractions.[384] Moreover, the Court of Disability Appeals is

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378. For a general discussion of the advantages and disadvantages of various models of administrative review, see Cass, *Allocation of Authority Within Bureaucracies: Empirical Evidence and Normative Analysis*, 66 B.U.L. REV. 1 (1986).

379. *See supra* notes 263-72 and accompanying text.

380. *See supra* notes 303-12 and accompanying text.

381. To the extent that the Appeals Council, which is not subject to guarantees of independence, engages in *de novo* review of ALJ decisions, the independence of the ALJ is of little benefit to the claimant. *See supra* notes 271-72 and accompanying text. Moreover, OHA's bureaucratic controls pressured ALJs to follow the Council's disability standards which were more restrictive than those imposed by the federal courts. *See supra* notes 206-09 and accompanying text.

382. *See* Rains, *supra* note 4, at 25-26.

383. *See supra* notes 316-53 and accompanying text.

384. *See* R. POSNER, *supra* note 1, at 99. Conversely, it might be argued that making the Court of Disability Appeals an article III court would enhance the quality of judges on that court.

a significant proposal; it will probably be necessary to "fine tune" it in the future. The fine tuning can be more readily accomplished if the judges of the court are not subject to article III safeguards. If time and experience demonstrate that the new court warrants article III status, appropriate steps could then be taken to convert the court into an article III court.

The use of magistrates attached to article III district courts has been suggested as an alternative to an article I court.[385] This suggestion arose from the fear that specialization in disability review produces systemic anti-claimant bias.[386] However, there is little evidence to suggest that any systemic bias in disability determinations has been caused by specialized administrative adjudication as opposed to SSA's restrictive policies and practices. Indeed, much of the tension between "specialist" ALJs and the SSA was brought about by ALJs' refusal to comply with SSA's restrictive practices. It seems that the advantages of specialization in terms of expertise far outweigh any inherent danger of systemic bias.[387] Moreover, proposals for using magistrates contemplate that they would be attached to district courts and presumably their decisions would be subject to district court review.[388] Rather than alleviate the disability caseload crisis, such proposals would simply add another layer of review on an already inefficient review process. Finally, the use of magistrates would not achieve the uniformity of disability standards that should be attained under Recommendation Two.

While an independent article I court has significant advan-

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385. *See, e.g.*, *Current Problems*, *supra* note 10, at 336 (letter from Stephen D. Pepe, U.S. Magistrate); Ogilvy, *supra* note 4, at 250-51.

386. *See Current Problems*, *supra* note 10, at 335-36; Ogilvy, *supra* note 4, at 245.

387. Specialization and its resulting expertise have not been advanced as advantages of Recommendation Two because the proposed Court of Disability Appeals may be viewed as a substitute for the Appeals Council which is already specialized rather than as a substitute for judicial review in district court. However, as compared to the alternative of increasing the use of magistrates, specialization would be a factor. The need for and advantages of specialization in disability appeals have been disputed. *See Current Problems*, *supra* note 10, at 335-36; Ogilvy, *supra* note 4, at 245; Rains, *supra* note 4, at 27. Despite these arguments, specialization and expertise appear to be significant advantages of the Court of Disability Appeals over the use of magistrates.

388. Some form of article III review would be necessary to avoid constitutional difficulties. *See* United States v. Ford, 824 F.2d 1430, 1434-37 (5th Cir. 1987) (en banc), *cert. denied*, 484 U.S. 1034 (1988) (delegation of authority to preside over jury selection would pose grave constitutional concerns given the difficulty of effective judicial review). *See generally supra* notes 316-53 and accompanying text. Since magistrates are attached to district courts, initial review of a decision would presumably rest with the court to which a given magistrate was associated.

tages, it may also frustrate the policymaking process. Recommendation Two divides policymaking responsibility between SSA, the Court of Disability Appeals, and the Federal Circuit: SSA would establish policy through its rules and regulations; the Court of Disability Appeals and the Federal Circuit would develop principles for determining disability through adjudication.[389] Experience with such "split-enforcement" models in other regulatory schemes suggests that dividing policymaking responsibility may paralyze a regulatory program. This has been particularly true under the Occupational Safety and Health Act, which vests rulemaking and enforcement authority in the Occupational Safety and Health Administration (OSHA) and adjudicatory power in the Occupational Safety and Health Review Commission (OSHRC).[390]

There are differences between Social Security and OSHA which may render the danger of paralysis less acute in the disability context, but disputes between SSA and the Court of Disability Appeals remain a distinct possibility.[391] Nonetheless, since the current disability determination system produces disputes between the federal courts and SSA, between the states and SSA, and between the ALJs and SSA, the net effect of the proposed reforms should be to reduce, not increase, the risk of policymaking paralysis. The centralized hierarchy created by Recommendations One, Two, and Three would be much more effective at resolving such disputes than the current system. The dispute-solving capability could be further enhanced by legislation specifying the relative authority of SSA and the Court of Disability Appeals regarding such matters as statutory construc-

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389. The formation of principles through the adjudicatory process contemplates a system of precedent and the reporting of decisions. For example, the Veterans' Judicial Review Act provides for the publication of Court of Veterans Appeals decisions. Pub. L. No. 100-687, § 301, 102 Stat. 4105, 4118 (1988) (to be codified at 38 U.S.C. § 4069).

390. *See* McGarity & Shapiro, *OSHA Regulation: Regulatory Alternatives and Legislative Reform*, 1987 ACUS 999, 1128-36 (Report for Recommendation 87-10) [hereinafter *OSHA Regulation Report*]; Johnson, *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 1986 ACUS 293 (Report for Recommendation 86-4) [hereinafter *Split-Enforcement Report*].

391. For example, OSHA prosecutes employers before OSHRC for violations of the Act. Such proceedings have a distinctly adversarial tone which tends to place OSHA and OSHRC on opposing sides despite OSHRC's supposed neutrality. Although SSA would appear in disability cases before the Court of Disability Appeals, the proceedings should be less adversarial because SSA's principal function is to provide benefits for claimants, not prosecute them. Nevertheless, the possibility exists that some in SSA may come to regard their principal responsibility as preventing the unwarranted award of benefits, which would tend to make the SSA take on an adversarial role akin to OSHA's.

tion and the interpretation of Social Security rules and regulations.[392] And as described more fully below, the Appeals Council could be adapted to coordinate SSA's disability policy with the developing case law of the new disability determination hierarchy.

3. *The Appeals Council*

Since Recommendation Two contemplates the formation of the Court of Disability Appeals from the Court of Veterans Appeals and the elimination of the Appeals Council's administrative review function, the question remains as to what should become of the Council. While many Council members may seek and receive appointments to the Court of Disability Appeals, it is neither necessary nor desirable to dissolve the Council. A recent comprehensive report on the Appeals Council suggested that the Council utilize its review power more selectively to shape disability policy through the resolution of cases presenting significant issues.[393] Under the recommendations made in this study, the Council can perform an analogous function by coordinating SSA regulatory policy with the developing case law. This function becomes even more important because of the increased independence of administrative review.

As a coordinating body, the Appeals Council could help prevent and resolve policymaking disputes between SSA and the review apparatus in several ways. First, the Council could evaluate litigation strategy with an eye toward maximizing SSA's ability to obtain satisfactory adjudicatory principles. Second, the Council could review existing regulations and recommend revisions to clarify provisions and avoid disputes. Third, the Council could examine decisions from the Federal Circuit and Court of Disability Appeals, analyze their implications for SSA, and consider appropriate responses such as appeal, promulgation of new regulations, or legislative reform. If these and similar tasks are performed effectively, the separation of Social Security regulatory

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392. *See OSHA Regulation Report*, *supra* note 390, at 1129-31; *Split-Enforcement Report*, *supra* note 390, at 335-36. The Federal Circuit should probably defer to the Court of Disability Appeals on questions involving statutory construction, but to SSA on questions involving the interpretation of rules and regulations. In contrast, some courts have deferred to OSHRC on the interpretation of OSHA regulations. *E.g.*, Brock v. Bechtel Power Corp., 803 F.2d 999, 1000 (9th Cir. 1986).

393. *Appeals Council Report*, *supra* note 3, at 798-821 (adopted in *New Role for Appeals Council*, *supra* note 375).

and adjudicatory functions is not likely to interrupt the smooth operation of the disability determination system.[394]

C. *Recommendation Three*

Administrative law judges resolving disability benefit claims should be removed from the administrative hierarchy of the SSA and placed in an independent corps.

Recommendation Three contemplates the retention of an ALJ hearing as the first step in the administrative review process, but proposes that the independence of ALJs be increased by removing them from the administrative hierarchy of SSA. Legislation would be necessary to create the ALJ corps and the bureaucratic structure under which it would function. The discussion below considers the reasons for increasing ALJ independence and the procedural model that should be employed in conducting ALJ hearings.

1. *ALJ independence*

Those ALJs who process Social Security disability claims are currently subject to the provisions of the Administrative Procedure Act (APA) intended to preserve their independence.[395] Under the APA, ALJs are not "employed" by SSA and can be removed from office only for "good cause" after a hearing before the Merit Systems Protection Board.[396] The SSA is prohibited from conducting performance evaluations of ALJs.[397] During the early 1980s, these protections proved to be inadequate for two reasons. First, ALJs are subject to review by the Appeals Council which is not protected by APA safeguards.[398] Second, SSA retained significant power over ALJs, which it exercised through bureaucratic pressures to increase productivity and reduce allowance rates, targeting ALJs for Bellmon Review, and initiating disciplinary proceedings against ALJs at a vastly increased rate.[399]

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394. Congress should consider abolishing the Council if there is opposition to such an Appeals Council role, if the need for coordination appears to be minor, or if the costs of maintaining the Council are excessive. *See Appeals Council Report*, *supra* note 3, at 821 (the Council should not be abolished without one more effort at serious reform).

395. *See supra* note 57 and accompanying text.

396. *See* 5 U.S.C. §§ 5372, 7521 (1988).

397. *See id.* § 5372; 5 C.F.R. § 930.211 (1989).

398. *See supra* notes 271-72 and accompanying text.

399. *See supra* notes 195-218 and accompanying text.

The experience of the 1980s suggests greater safeguards are necessary to protect the decisional independence of ALJs. One such safeguard, review by an independent article I tribunal, has been proposed in Recommendation Two. Given the disturbing impact of SSA's oversight efforts in the 1980s, SSA's residual authority over ALJs should also be curtailed by removing disability ALJs from the administrative hierarchy of SSA and placing them in an independent corps.[400] Removing ALJs from the SSA would reduce, though not completely eliminate, the risk that administrative pressures would be imposed on ALJs. The ALJs would still have to process a large number of claims so pressure to swiftly dispose of cases is likely to remain even in an independent ALJ corps.[401] Some bureaucratic pressure to process cases efficiently may be desirable to ensure that the huge disability caseload can be managed. Nevertheless, the creation of an independent ALJ corps would tend to reduce the danger that pressure to hurry claims will be accompanied by pressure to achieve particular outcomes.

Even if ALJs were removed from SSA, SSA would retain some power to affect ALJ decisions. Although the SSA's current practice of own-motion Bellmon Review would necessarily be eliminated, SSA should be given power to seek review of ALJ decisions. This power is necessary to enable SSA to pursue effectively its disability policy objectives before the Court of Disability Appeals and to prevent the disability determination process from taking on an excessively pro-claimant cast. The SSA may be inclined to appeal more frequently from decisions of high-allowance ALJs, and the threat of reversal by the Court of Disability Appeals may influence some ALJs to deny some marginal claims. On the whole, however, this practice should constitute far less of a threat to ALJ independence than did targeted Bellmon Review; it would not be part of a systematic legislative and regulatory program designed to bring "aberrant" ALJs into line and review would ultimately be conducted by an independent tribunal. Presumably SSA would be able to request the ini-

400. Many other observers have made this recommendation, both with regard to ALJs in general and Social Security ALJs in particular. *See, e.g.*, D. COFER, *supra* note 6, at 188-91 (Social Security ALJs); Lubbers, *A Unified Corps of ALJs: A Proposal to Test the Idea at the Federal Level*, 65 JUDICATURE 266, 272-76 (1981) (all ALJs); Note, *Preserving the Judicial Independence of Federal Administrative Law Judges: Are Existing Protections Sufficient?*, 4 J.L. & POL. 207, 228-32 (1987) (all ALJs).

401. Even article III judges have experienced similar pressures. *See supra* note 282 and accompanying text.

tiation of disciplinary proceedings and therefore threaten ALJ decisional independence to some degree, but this threat would be weaker than the danger currently posed by SSA's power to initiate proceedings.[402]

2. Procedures

The question remains as to whether the increased independence of ALJs calls for a change in the procedural orientation of ALJ hearings. Under the current system, actions before ALJs have significant nonadversarial elements: the ALJ represents the government's interest since SSA does not appear, assists the claimant in the development of his or her claim, and ultimately decides the case.[403] Although there is some dispute over the desirability of such a nonadversarial approach,[404] the increased independence of ALJs may require a more adversarial procedure. As noted above, SSA needs the power to initiate appeals and appear in opposition to claims before the Court of Disability Appeals and the Federal Circuit.[405] Similar considerations strongly suggest that SSA be allowed to appear in opposition to claims before ALJs and perhaps seek review of state DDS decisions.[406] The SSA's participation in an adversarial role obviously detracts from the nonadversarial nature of the ALJ hearing. On the other hand, while SSA will take an adversarial posture in some cases, its principal goal should not be to oppose disability benefits whenever possible, but rather to ensure that eligible claimants and only eligible claimants receive benefits. Whether or not SSA can maintain this goal is largely a question of SSA's attitude, which can be reinforced by toning down the adversarial aspects of the ALJ hearing.

Practical considerations also dictate that ALJs continue to

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402. Presumably, the authority to initiate disciplinary proceedings would rest within the administrative hierarchy of the ALJ corps, but absent some special statutory provision there would be nothing to prevent SSA from filing a complaint against an ALJ or otherwise requesting the initiation of proceedings. Nor would such a statutory prohibition be desirable because an SSA request for disciplinary proceedings is an appropriate response in those cases where discipline may be necessary.

403. *See supra* notes 55-56 and accompanying text.

404. *Compare, e.g.*, HEARINGS AND APPEALS, *supra* note 4, at xxi (rejecting the use of adversarial procedures) *with* D. COFER, *supra* note 6, at 161-63 (ALJs favor more adversarial procedures). *See also supra* note 373.

405. *See supra* notes 372-73 and accompanying text.

406. SSA review of state DDS decisions is discussed further in connection with Recommendation Four. *See infra* notes 418-19 and accompanying text.

assist claimants in the development of their claims, a function that will be aided by increased ALJ independence. Most claimants are represented by counsel at the ALJ stage,[407] but ALJ assistance is vital for those who are not represented—particularly if SSA is to appear in opposition.[408] Even claimants with counsel may have limited means and therefore may require government assistance in obtaining medical evidence.[409] In addition, increased resources to state DDSs coupled with SSA's involvement as a party in ALJ hearings should improve the quality of the administrative record created in the determination process, but ALJ involvement in developing the record at the hearing stage would ensure an adequate record for review by the Court of Disability Appeals and the Federal Circuit.

D. Recommendation Four

Improvements in the state DDS process should be considered, particularly the infusion of additional resources to improve the quality of initial determinations. Current experiments with face-to-face hearings at the initial determination and/or reconsideration stage should be continued, and the systemwide adoption of such a procedure should be considered. The SSA should retain its current responsibilities for overseeing state DDSs.

While a thorough review of disability determinations at the state level is beyond the scope of this study, the study would be incomplete without some discussion of the relationship between initial determinations and reconsiderations and the review process as a whole. Recommendation Four is based on the recognition that improvements in the quality and accuracy of the initial determination process would produce two significant benefits throughout the system. First, increased claimant and SSA satisfaction with state DDS determinations would reduce the caseload at each succeeding level.[410] Second, even in cases that

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407. *See supra* note 58 and accompanying text.

408. The problem may be ameliorated by allowing attorneys' fees for successful claimants at the ALJ level. *See supra* note 366 and accompanying text.

409. To the extent that improvements in state DDS determinations, *see infra* note 411 and accompanying text, make it possible to "close" the record and prevent the introduction of new evidence at the ALJ level, the need for ALJ assistance to claimants may be less acute.

410. This reduction would be the product of both increased accuracy and the pro-

are appealed, improvements in the quality of initial determinations and reconsiderations would facilitate review at succeeding levels.[411]

With regard to improving state DDS proceedings, current experiments with face-to-face hearings at the state level are a promising start.[412] A DDS agent's opportunity to actually observe claimants should improve the assessment of disability.[413] Furthermore, claimants should be more satisfied with adverse decisions when they have had the opportunity to appear and make their case in person.[414] If such face-to-face hearings prove to be effective, they should be adopted on a systemwide basis,[415] but only if sufficient resources are devoted to ensure the quality of the hearings.[416] A concomitant savings of resources might be obtained by eliminating the reconsideration stage.[417]

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tection of process values which would increase claimants' acceptance of adverse decisions. *See* J. MASHAW, *supra* note 6, at 88-97. *But see infra* note 414 and accompanying text.

411. The poor quality of state DDS determinations has been a major complaint of ALJs. *See, e.g.*, ALJs SURVEY AND ISSUE PAPER, *supra* note 368, at 53-54.

412. Such hearings are now provided at the initial determination or reconsideration stage throughout the system for CDR cases and in some states for new applications. *See supra* notes 40, 44-50 and accompanying text.

413. *See* ALJs SURVEY AND ISSUE PAPER, *supra* note 368, at 46-48 (ALJs are nearly unanimous on the value of face-to-face hearings in improving decisional accuracy).

414. The extent to which this increased satisfaction would result in a reduction in appeals rates is unclear. A recent study of experimentation with face-to-face hearings reported that claimants were generally satisfied with face-to-face hearings at the state DDS level. *See State Procedures Report*, *supra* note 33, at 601. Despite this satisfaction, the rate of claimant appeals from adverse decisions did not decline significantly. *Id.* at 598 (data from initial experiments showed only a small decline in appeal rates in two states and an increase in the appeal rate of one state). *See also id.* at 607 (the response to an "ambiguous" questionnaire indicated 91% of claimants expected to appeal adverse decisions). The report concluded, "[A]ny change in appeal rates may take years or even decades to appear. Changes in expectations may happen slowly. High reversal rates at the ALJ stage may be expected to encourage appeals." *Id.* at 608.

415. Although a hearing is contemplated, it should be an essentially nonadversarial proceeding. *See supra* notes 373, 403-04 and accompanying text. The hearing should be more or less a cooperative enterprise between the state DDS and the claimant, in which the claimant who is normally unrepresented receives assistance from the state DDS in assembling the medical and vocational evidence. Because Recommendation Four proposes that SSA retain its supervisory power over state DDSs, SSA should not appear in opposition to the claimant at this stage of the process.

416. *See State Procedures Report*, *supra* note 33, at 611 ("Nationwide mandating of face-to-face hearings or interviews will impose substantial personnel burdens upon state DDS agencies.").

417. Under the current experiments, reconsideration is foreclosed when face-to-face hearings are provided at the initial determination level. *See supra* note 40. This makes sense. If hearings are of high quality, reconsideration can be eliminated without a significant reduction in state DDS accuracy. Moreover, unless reconsideration also involved a

Recommendation Four contemplates that SSA will continue to oversee the operation of state DDSs. At least two steps should be taken to ensure that SSA oversight does not conflict with independent review of DDS decisions. First, the Quality Assurance Review (QAR) system should be modified or abolished because it involves SSA review of state DDS decisions and such review conflicts with the contemplated independent review system. Instead, SSA's substantive oversight of state DDSs should be limited to the promulgation of rules and regulations and a right to appeal from state DDS decisions.[418] The abolition of QAR would reduce, though not completely eliminate, some of the tensions that arose between SSA and state DDSs during the early 1980s.[419] Second, Congress should enact legislation specifying that state DDSs are bound only by statutes, SSA regulations promulgated under the notice and comment provisions of the APA, and decisions of the Court of Disability Appeals, the Federal Circuit, and the Supreme Court.[420] Such legislation would both prevent confusion in the event of conflict between SSA and

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hearing, retention of paper review would undermine the gains from hearings at the initial determination level.

418. This should provide ample substantive authority for SSA to conduct its oversight function. Pursuant to its regulatory authority, SSA would adopt broad based standards to control DDS determinations *ex ante*, and SSA's right of appeal would enable it both to ensure that these regulations are applied correctly and to participate in the formulation of adjudicatory principles. *See supra* notes 283, 373, 402 and accompanying text.

419. Recommendation Four should ease the apparent bias of focusing on DDS determinations granting benefits. *See supra* note 191 and accompanying text. Although SSA would primarily appeal decisions awarding benefits (given the ostensibly non-adversarial aspects of the disability determination process, there is no reason to prevent SSA from appealing on behalf of a claimant), the claimant would receive greater protection under Recommendation Four than in the current system. First, the state DDS determination will be reviewed by an independent administrative and judicial hierarchy. *Cf. supra* notes 271-72 and accompanying text (discussing the analogous problem of Appeals Council review of ALJs under the Bellmon Review program). Second, SSA would appeal as a party on equal footing with the claimant rather than conducting a *sua sponte* review as an oversight agency.

Of course, individual officials in state DDSs may perceive SSA appeals to be an expression of dissatisfaction with their decisions, but this sort of pressure should not be as great under Recommendation Four as under the QAR program. *See supra* notes 192-93 and accompanying text. The independence of the reviewing ALJs and the Court of Disability Appeals would protect state DDS officials to some degree just as it would protect individual claimants. Moreover, some problems can be countered in advance by legislation specifying which standards bind the state DDSs.

420. Of course, state DDSs would also be bound by the Constitution and should follow nonbinding SSA policies to the extent that they are not in conflict with standards that are binding.

the independent review apparatus and alleviate the problem of nonpublic policymaking through mechanisms such as the POMS.[421]

IV. CONCLUSION

Systemic reform of the Social Security disability determination process is desirable, both to ease the caseload burden of the federal courts and to improve the accuracy and fairness of disability determinations. While current caseloads are below the peak levels of the early 1980s, they remain relatively high and constitute a sizeable drain on judicial resources. Moreover, the experience of the early 1980s demonstrates the vulnerability of the system. Efforts to cope with caseload and fiscal pressures may place the fairness of the entire disability determination process in jeopardy. To resolve these problems, this study has proposed comprehensive reform in the form of four specific recommendations. Taken together, these recommendations would conserve judicial resources by limiting judicial review but protect claimants by creating an independent article I Court of Disability Appeals and increasing the independence of ALJs. Improvements in the state DDS process would also produce benefits throughout the system.

AUTHOR'S POSTSCRIPT

Since this study was completed, the Federal Courts Study Committee has prepared its Preliminary Report and held public hearings on its proposals for reform. Two aspects of these deliberations merit comment. First, while the Preliminary Report incorporated most of this study's recommendations, the Committee contemplated that article III review of disability determinations would continue to be distributed among the various circuit courts of appeals, apparently rejecting this study's recommendation that review be confined to the Federal Circuit.[422] Second, at the public hearings, critics opposed the creation of an article I Court of Disability Appeals.[423]

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421. *See supra* notes 186-87 and accompanying text.

422. *See Sweeping Changes Recommended by Federal Courts Study Committee*, 58 U.S.L.W. 2442, 2443 (Feb. 6, 1990) [hereinafter *Sweeping Changes*]; 22 THE THIRD BRANCH, Jan. 1990, at 6.

423. *See Sweeping Changes*, *supra* note 422, at 2443 (objections of Judge Abner Mikva of the Circuit Court of Appeals for the District of Columbia); *Committee on Federal Courts Encounters Unexpected Opposition to Some Proposals*, Wall St. J., Feb. 12,

Despite these developments, the author remains convinced that it is desirable to move Social Security disability determinations into an independent, specialized judicial hierarchy. First, and most importantly, such a system will facilitate a much needed unification of Social Security disability law. The current fragmented approach to disability determinations has left the law in disarray, imposing great hardship on individual claimants and creating tension and conflict throughout the disability determination system. Second, rationalizing and streamlining the disability system as recommended in this study should make the system more efficient and effective in accomplishing its principal goal, the accurate determination of disability status. As long as appropriate steps are taken to safeguard the independence of the administrative hierarchy, these gains in efficiency need not entail the sacrifice of fairness to individual claimants. Third, the system would also gain from the development of technical expertise by those members of the article III judiciary responsible for reviewing disability determinations.

These advantages of this study's approach to reform should, of course, be weighed against any disadvantages likely to result if the proposals are implemented. The Committee's decision not to confine article III review to the Federal Circuit and public opposition to the proposed Court of Disability Appeals raise some legitimate concerns about the impact of the proposed reforms. Nonetheless, closer examination of these concerns suggests that they can be addressed without abandoning the goal of unifying the disability determination process into a single hierarchy and its concomitant advantages.

The Committee did not explain its decision to retain the current system of geographically distributed appeals (nor was it incumbent upon the Committee to explain), but several possible explanations can be identified. First, geographic barriers might impose a substantial burden on claimants if the only article III review is conducted by a single court sitting in Washington, D.C.[424] Second, the Committee may have regarded a unified article III appellate court to be unnecessary or undesirable given that the Committee is recommending a device for resolving intercircuit conflicts[425] and that some submissions to the Commit-

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1990, at B3, col. 1 [hereinafter *Unexpected Opposition*].

424. *See supra* notes 363-66 and accompanying text.

425. *See Sweeping Changes*, *supra* note 422, at 2445; THE THIRD BRANCH, *supra* note 422, at 7.

tee generally questioned the wisdom of adopting subject matter specialization on a widespread basis throughout the judicial hierarchy.[426] Finally, there may have been some concern that the Federal Circuit was ill-suited to fulfill the exclusive review function because of its limited size and lack of expertise in disability matters.[427]

Whatever the concerns that caused the Committee to reject exclusive Federal Circuit review, they can and should be accommodated under some alternative system of specialized article III review. Problems with geographic barriers and concerns about the suitability of using the Federal Circuit could be alleviated by a properly structured court of appeals which specialized in a broader class of public benefits cases.[428] A new court could avoid some of the problems associated with the Federal Circuit as currently configured. It could be made large enough to handle its projected caseload, could sit in geographically dispersed panels (or "ride circuit") with an *en banc* mechanism for resolving conflicts, and it could be staffed by experts in public benefit law. Broadening the scope of cases heard by the specialized court would limit some of the problems sometimes associated with specialization such as politicization of appointments, boredom, and lack of "cross-pollination" from other areas of law.[429]

Public opposition to the proposed Social Security Disability Court seems to stem from groups representing claimant interests. Similar opposition emerged with respect to prior SSA-supported proposals for a Social Security Court.[430] Critics viewed such proposals as obvious attempts by SSA to avoid federal district court review because district court rejection of the restric-

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426. For a general discussion of the advantages and disadvantages of specialization, see Dreyfuss, *Specialized Adjudication*, 1990 B.Y.U. L. REV. 377. *See also*, Kramer, *Jurisdiction over Civil Tax Cases*, 1990 B.Y.U. L. REV. 443, 456-57 (discussing advantages and disadvantages of specialized tax courts).

427. *See supra* notes 360-62 and accompanying text. The Committee may have also been reluctant to vest responsibility for reviewing disability determinations in the Federal Circuit because of recent criticism of the Federal Circuit's exercise of its review function in other areas. *See, e.g.*, Filardi, *Appellate Review of Patent Bench Trials: Is the CAFC Following Rule 52(a)?*, in CURRENT DEVELOPMENTS IN PATENT LAW 1985 (Practicing Law Institute Course Handbook Series).

428. In addition to Social Security and Veterans disability cases, the court could hear, for example, appeals from Medicare decisions, Black Lung cases, etc.

429. For discussion of such problems, see Dreyfuss, *supra* note 426, at 379-82; Kramer, *supra* note 426, at 456-57. Of course, this broadening of scope would not completely eliminate these problems, but they should be less significant than would be the case if a court were exclusively devoted to Social Security disability appeals.

430. *See supra* note 4.

tive policies of the 1980s was instrumental in forcing SSA to modify these policies.[431] Thus, opposition to an article I Social Security Court is premised on the assumption that such a court would be the "captive" of the SSA and therefore insufficiently protective of claimant interests.[432]

It is easy to understand opponents' mistrust of an administrative court for disability appeals, since earlier proposals were pushed hard by SSA at a time when its restrictive policies were meeting resistance in the federal district courts. But an independent article I court need not be inherently "pro-SSA," and, in the absence of ideological bias, can be sufficiently protective of claimants' interests, particularly when operating in combination with a more independent ALJ corps. However, the opposition to the proposed Court of Disability Appeals underscores the need to prevent the court from being captured by SSA (or claimants, for that matter). One mechanism that might help depoliticize the Court of Disability Appeals would be to vest the appointment of its judges in the judiciary rather than in the political branches.[433]

Thus, despite the hesitancy of the Committee and the con-

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431. Thus, opposition to a specialized Social Security Court is based not so much on objections to the court itself, but to the use of such a court to replace district court review. For example, Judge Mikva criticized the proposal for an article I court on the grounds that district court review was an essential "fail safe device" that must be maintained given the importance of disability determinations to the claimants they affect. *Sweeping Changes*, *supra* note 422, at 2443.

432. An analogous but somewhat broader objection was voiced by some opponents of the Committee's recommendations, who argued that the Committee's reliance on specialized courts in various contexts amounted to an effort "to close the doors of the courts to those without much power or money." *Unexpected Opposition*, *supra* note 423, at B3, cols. 1-2. Insofar as this objection is based upon the supposedly inferior quality of the process before non-article III courts, it is not particularly cogent in the context of this study's recommendations, which on balance should improve the quality of disability determinations. There may also be, however, a symbolic element to the objection; *i.e.*, the availability of district court review may be an important symbol of the system's recognition that disability claims are of vital importance to the individual, and that despite the small monetary amounts involved, disability claims warrant the most highly regarded decisionmakers the system has to offer. While there is something to this argument, its force ultimately depends on the quality of the system that replaces district court review. If the article I court is of high quality and the residual article III review is effective within its sphere, then confidence in the system will obviate any concerns over the symbolic impact of the decisionmakers' status.

433. Under article II, section 2, clause 2 of the United States Constitution, Congress may "vest the Appointment of such inferior Officers, as they think proper, . . . in the courts of law . . . ." *See* Morrison v. Olson, 487 U.S. 654 (1988). Currently, bankruptcy judges are appointed by the courts of appeals. *See* 28 U.S.C. § 152 (Supp. V 1987). A similar appointment process could be used for judges of the Court of Disability Appeals.

cerns of SSA's critics, the general approach advocated in this study is sound. The author does not support and does not intend to advocate the sacrifice of individual claimant interests in the name of efficiency, and some fine tuning of the recommendations may be in order to alleviate concerns that have been raised. Given proper safeguards, however, the recommendations in this study can both protect individual claimants and resolve disability cases more efficiently and accurately. Certainly the history of the disability determination process of the 1980s indicates that systemic reform is essential. Opposition to individual aspects of the recommendations should, to the extent feasible, be accommodated within the framework of the approach recommended in the study, and should not deter the Committee or Congress from the goal of systemic reform. Otherwise, an historic opportunity for improving the beleaguered Social Security disability system will be dismantled piecemeal in the deliberative process.